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The NORTH CAROLINA *REGISTER*

IN THIS ISSUE

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Tax Review Board

PROPOSED RULES
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Environment, Health, and Natural Resources
Human Resources
Insurance
Medical Examiners, Board of

LIST OF RULES CODIFIED

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ISSUE DATE: July 1, 1993

Volume 8 • Issue 7 • Pages 503 - 640



INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. 1:1 NCR 101-201, April 1, 1986 refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of
Administrative Hearings, ATTN: Rules Division, P.O.
Drawer 27447, Raleigh, North Carolina 27611-7447, (919)
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NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER

Publication Schedule (January 1993 - December 1993)

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
03/01/93	02/08/93	02/15/93	03/16/93	03/31/93	04/20/93	06/01/93
03/15/93	02/22/93	03/01/93	03/30/93	04/14/93	04/20/93	06/01/93
04/01/93	03/11/93	03/18/93	04/16/93	05/01/93	05/20/93	07/01/93
04/15/93	03/24/93	03/31/93	04/30/93	05/15/93	05/20/93	07/01/93
05/03/93	04/12/93	04/19/93	05/18/93	06/02/93	06/20/93	08/02/93
05/14/93	04/23/93	04/30/93	05/29/93	06/13/93	06/20/93	08/02/93
06/01/93	05/10/93	05/17/93	06/16/93	07/01/93	07/20/93	09/01/93
06/15/93	05/24/93	06/01/93	06/30/93	07/15/93	07/20/93	09/01/93
07/01/93	06/10/93	06/17/93	07/16/93	07/31/93	08/20/93	10/01/93
07/15/93	06/23/93	06/30/93	07/30/93	08/14/93	08/20/93	10/01/93
08/02/93	07/12/93	07/19/93	08/17/93	09/01/93	09/20/93	11/01/93
08/16/93	07/26/93	08/02/93	08/31/93	09/15/93	09/20/93	11/01/93
09/01/93	08/11/93	08/18/93	09/16/93	10/01/93	10/20/93	12/01/93
09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
10/01/93	09/10/93	09/17/93	10/16/93	10/31/93	11/20/93	01/04/94
10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE TAX REVIEW BOARD

In the matter of:
The Proposed Assessment of
Corporate Income Tax for the
taxable year ended 30 June 1989
by the Secretary of Revenue
against **UCI Holdings, Inc.**

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**ADMINISTRATIVE
DECISION NUMBER: 273**

THIS MATTER was heard before the undersigned duly appointed and acting members of the Tax Review Board at its regular meeting in the City of Raleigh on 30 April 1993, upon the petition of **UCI Holdings, Inc.** for review of a Final Decision of the Deputy Secretary of Revenue entered 12 September 1991 sustaining a proposed assessment of corporate income tax for the taxable year ended 30 June 1989.

AND IT APPEARING TO THE BOARD that the findings of fact made by the Deputy Secretary of Revenue were fully supported by competent evidence of record, that the conclusions of law made by the Deputy Secretary were fully supported by the findings of fact, and that the decision by the Deputy Secretary was fully supported by the conclusions of law;

IT IS THEREFORE ORDERED that the Final Decision of the Deputy Secretary of Revenue is confirmed in every respect.

Entered this the 8th day of June, 1993.

TAX REVIEW BOARD

Harlan E. Boyles, Chairman
State Treasurer

William W. Redman, Jr.
Chairman, Utilities Commission

Jeff D. Batts

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE TAX REVIEW BOARD

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In the matter of:
The Proposed Assessment of
Additional Income Tax for
taxable year 1988 by the
Secretary of Revenue against
Jeffrey S. and Polly K. Whittle.
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)
)

**ADMINISTRATIVE
DECISION NUMBER: 274**

THIS MATTER was heard before the undersigned duly appointed and acting members of the Tax Review Board at its regular meeting in the City of Raleigh on 30 April 1993, upon the petition of **Jeffrey S. and Polly K. Whittle** for review of a Final Decision of the Deputy Secretary of Revenue entered 18 February 1992 sustaining a proposed assessment of additional income tax for the tax year 1988.

AND IT APPEARING TO THE BOARD that the findings of fact made by the Deputy Secretary of Revenue were fully supported by competent evidence of record, that the conclusions of law made by the Deputy Secretary were fully supported by the findings of fact, and that the decision by the Deputy Secretary was fully supported by the conclusions of law;

IT IS THEREFORE ORDERED that the Final Decision of the Deputy Secretary of Revenue is confirmed in every respect.

Entered this the 8th day of June, 1993.

TAX REVIEW BOARD

Harlan E. Boyles, Chairman
State Treasurer

William W. Redman, Jr.
Chairman, Utilities Commission

Jeff D. Batts

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE TAX REVIEW BOARD

In the matter of:
The Proposed Assessment of
Additional Sales and Use Tax
for the period 1 July 1983
through 30 June 1986 by the
Secretary of Revenue against
Piedmont Aviation, Inc.

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**ADMINISTRATIVE
DECISION NUMBER: 275**

THIS MATTER was heard before the undersigned duly appointed and acting members of the Tax Review Board at its regular meeting in the City of Raleigh on 30 April 1993, upon the petition of **Piedmont Aviation, Inc.** for review of a Final Decision of the Deputy Secretary of Revenue entered 6 July 1992 sustaining a proposed assessment of additional sales and use tax for the period 1 July 1983 through 30 June 1986.

AND IT APPEARING TO THE BOARD that the findings of fact made by the Deputy Secretary of Revenue were fully supported by competent evidence of record, that the conclusions of law made by the Deputy Secretary were fully supported by the findings of fact, and that the decision by the Deputy Secretary was fully supported by the conclusions of law;

IT IS THEREFORE ORDERED that the Final Decision of the Deputy Secretary of Revenue is confirmed in every respect.

Entered this the 8th day of June, 1993.

TAX REVIEW BOARD

Harlan E. Boyles, Chairman
State Treasurer

William W. Redman, Jr.
Chairman, Utilities Commission

Jeff D. Batts

**TITLE 2 - DEPARTMENT OF
AGRICULTURE**

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Board of Agriculture intends to amend rules cited as 2 NCAC 20B .0102 - .0104; .0106; .0203 - .0204; .0206; .0208; .0211; .0214; .0216; .0218; .0220; .0225; .0301; .0411; .0413; .0426; 2 NCAC 48A .0611; 2 NCAC 48C .0005; .0017; .0020 - .0021; .0023 - .0024; 2 NCAC 52B .0502; and repeal rules cited as 2 NCAC 20B .0105 and .0414.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on August 12, 1993 at the Gov. James B. Hunt, Jr. Horse Complex (Restaurant), 4601 Trinity Rd., Raleigh, NC 27607.

Reason for Proposed Action:

- 2 NCAC 20B .0102 - TRAFFIC REGULATIONS - To make minor changes in State Fair traffic rules.
- 2 NCAC 20B .0103 - ADVERTISING MATTER - To update description of State Fair boundaries.
- 2 NCAC 20B .0104 - ADMISSION REGULATIONS - To increase State Fair gate admission prices and to update operating hours.
- 2 NCAC 20B .0105 - EMPLOYEE REGULATIONS - To remove internal operating procedure from rules.
- 2 NCAC 20B .0106 - GENERAL - To make grammatical changes and to remove prohibition on metal drink containers.
- 2 NCAC 20B .0203 - OCCUPANCY OF SPACE - To clarify wording.
- 2 NCAC 20B .0204 - FORFEITURE - To update reference to duration of State Fair.
- 2 NCAC 20B .0206 - EXPIRATION OF CONTRACTS - To reduce time for removal of temporary booths from Fairgrounds.
- 2 NCAC 20B .0208 - TIME LIMITS ON REMOVAL - To change time for dismantling of exhibits and removal of items on display outdoors.
- 2 NCAC 20B .0211 - SIGNS - To prohibit cardboard signs.
- 2 NCAC 20B .0214 - LOUDSPEAKERS: ETC. - To update reference to State Fair operating hours.
- 2 NCAC 20B .0216 - PRICE SIGNS - To clarify requirements for posting prices at food stands.
- 2 NCAC 20B .0218 - CLEANLINESS - To clarify

lessee's responsibility for waste disposal.

2 NCAC 20B .0220 - STORAGE TRAILERS - To change requirements for parking trailers on Fairgrounds.

2 NCAC 20B .0225 - GAS OR ELECTRIC SERVICE - To clarify requirements for electrical service to exhibitors.

2 NCAC 20B .0301 - EXHIBITS AND EXHIBITORS - To delete prohibition on removal of livestock prior to midnight on last day of State Fair.

2 NCAC 20B .0411 - RESERVATIONS AND PAYMENT OF CHARGES - To clarify requirements for deposits and settlements with lessees of State Fair property.

2 NCAC 20B .0413 - ALCOHOLIC BEVERAGES - To clarify restrictions on sale and consumption of alcohol at horse facilities.

2 NCAC 20B .0414 - APPLICABILITY OF REGULATIONS - To repeal unnecessary rule.

2 NCAC 20B .0426 - RENTAL RATES: FEES: AND PREMIUM BOOKS - To clarify rule concerning establishment of rental fees.

2 NCAC 48A .0611 - PROGRAM PARTICIPATION AND PAYMENT OF FEES - To delete provisions for refund of penalties and interest on unpaid fees.

2 NCAC 48C .0005 - PROHIBITED SALES - To clarify wording.

2 NCAC 48C .0017 - INSPECTION AND STOP SALE ACTION OF SEED INSPECTORS - To clarify and update procedures for issuance of stop-sale orders on seed.

2 NCAC 48C .0020 - TAGS AND LABELS AND STAMPS - To update rule to conform to changes in the law concerning seed tags and stamps.

2 NCAC 48C .0021 - RESPONSIBILITY FOR OBTAINING NEW GERMINATION TEST - To delete reference to a specific time for new seed germination tests.

2 NCAC 48C .0023 - ANALYSIS FOR FARMERS OR SEEDMEN - To clarify procedures for seed analysis services.

2 NCAC 48C .0024 - IDENTIFICATION AND SIZE OF SAMPLES FOR SERVICE TESTING - To clarify and make grammatical changes.

2 NCAC 52B .0502 - HEALTH REGULATIONS FOR POULTRY EXHIBITIONS - To indicate increased pullorum test fee for testing of exhibition birds.

Comment Procedures: Interested persons may present their statements either orally or in writing at the public hearing or in writing prior to the hearing by mail addressed to David S. McLeod,

Secretary of the North Carolina Board of Agriculture, P.O. Box 27647, Raleigh, NC 27611.

CHAPTER 20 - THE NORTH CAROLINA STATE FAIR

SUBCHAPTER 20B - REGULATIONS OF THE STATE FAIR

SECTION .0100 - GENERAL PROVISIONS

.0102 TRAFFIC REGULATIONS

(a) Applicable North Carolina laws relating to traffic, parking and the operation of motor vehicles, as amended from time to time, are hereby incorporated into and made a part of these regulations, and the same shall be in full force and effect as to all parts of the North Carolina State Fair grounds, and as to the operation of motor vehicles therein and thereon, and shall have the same force and effect as though the said provisions were herein specifically set out in full.

(b) Parking on all streets within the fair grounds is prohibited between the hours of 1:00 a.m. and 6:00 a.m. during the period of the fair. All trucks and motorized vehicles must complete their deliveries and be off the streets by 10:00 a.m. each day. Absolutely no deliveries will be allowed (with the exception of ice) by motorized vehicles between the hours of 10:00 a.m. and midnight all days of the fair. During the period of the fair, certain locations within the fair grounds will be designated "restricted area." Parking or vehicular traffic within such restricted areas is prohibited without special permit ~~from 6:00 a.m. to midnight each day of the fair~~. During all periods of the year other than State Fair period, vehicles may not be parked on State Fair streets or in State Fair parking lots for a period in excess of 24 hours unless previous arrangements to the contrary are made with the manager. Vehicles left on the grounds in violation of this Rule may be towed away and impounded at owner's risk and expense.

(c) Unauthorized vehicles will not be allowed on the North Carolina State Fair grounds except in parking areas during the period of the annual State Fair unless such vehicles are on display in an exhibition and in such case, said vehicles must be kept in exhibit location and may not, under any circumstances, be operated on the streets of the fair grounds. State Fair personnel are authorized to use vehicles where necessary on the fair grounds in performance of duties.

(d) The State Fair management has set aside parking spaces for automobiles in various parts of

the State Fair grounds. Automobiles and articles may be left in said parking spaces during the period of the State Fair at owner's risk.

(e) Any trailer or similar vehicle used for sleeping or cooking must be parked in the limited areas established and controlled by special permission from the manager at set fees per night.

(f) A vehicle parked in violation of North Carolina statutes and these regulations shall be removed to a parking lot outside the fence. Administration office ~~and sheriff office~~ shall be notified of make of car, license and where it is moved to. State Fair is not responsible for any damage in moving or after moving.

(g) The Manager of the State Fair shall have authority to order the placement of such traffic control or restrictive signals and signs on the State Fair grounds as he shall deem necessary for the proper safety, protection and control of said fair grounds.

Statutory Authority G.S. 106-503.

.0103 ADVERTISING MATTER

(a) Distribution of advertising material or matter of any kind, nature, or description by concessionaires, exhibitors, patrons attending annual exhibitions on the State Fairgrounds, political parties, or by any other person or persons whomsoever, shall be, and the same hereby is, prohibited on the State Fairgrounds unless such distribution shall be within and from the assigned and designated space and shall have been first duly authorized by the State Fair Manager upon application thereto, and that advertising material or matter of any kind, nature or description shall be on the counter or display area and shall not be handed out unless a fair patron requests such materials. Promiscuous handing out of such material, even from designated areas, is strictly forbidden.

(b) The distribution in any manner of advertising material having a gummed or adhesive backing, such as labels, lapel badges, car bumper or window stickers, etc., whether such distribution shall be from a contracted exhibit or concession space or elsewhere, is prohibited upon the State Fair grounds. Persons or firms found distributing such materials may, in the discretion of the fair manager, immediately forfeit all space right and, in addition, may be held financially responsible for any and all damage done to or occasioned by the State Fair as a result of these materials being affixed to State Fair property by third parties.

(c) Operation of sound trucks or mobile vehicles equipped with public address systems, or vehicles

upon which any advertising signs, political or otherwise, have been affixed in any manner, whether such vehicles are in motion on the fair grounds or parked therein or abutting same, and operation thereof or parking same on the State Fair grounds, whether within or without the fenced-off area thereof, is hereby prohibited unless specific authorization for such operation or parking thereof shall have been first secured from the manager upon due application thereto.

(d) For the purpose of enforcing the provisions of this Section, it is hereby determined that the State Fair grounds shall consist of and constitute that certain area of land in Wake County bounded on the south by N.C. Highway 54 Hillsborough Street, on the east by Prison Farm Road Blue Ridge Boulevard, on the north by Old Trinity Road, and on the west by State Fair Youth Center the Gov. James B. Hunt, Jr. Horse Complex, and includes the area without as well as within the fenced portion thereof.

(e) The prohibitions and restrictions relating to advertising in these regulations shall not be construed as being applicable to lettered service trucks advertising a concern or its products while making necessary deliveries of merchandise or service to concessionaires or exhibitors on the State Fair grounds, or the normal small advertising on bumpers and windows of vehicles.

Statutory Authority G.S. 106-503.

.0104 ADMISSION REGULATIONS

(a) All persons entering the North Carolina State Fair grounds must pay the established admission fee, except persons holding worker's permits. One-time-only admissions will be issued to those persons who are employed by the fair or are asked to appear on the grounds by the fair management for a specific purpose, relative to the operation of the fair.

(b) The gates of the North Carolina State Fair will be open to visitors from 9:00 a.m. until midnight each day of the fair, ~~except Sunday, when opening will be at 12:00 noon.~~ Exhibit buildings will be open from 9:00 a.m. to 9:45 p.m. daily, ~~except Sunday, when opening will be at 12:00 noon.~~

(c) The State Fair Manager may operate a pass-out system at one or more of the outside gates. Persons exiting through these gates may, upon request, have their hand or vehicle stamped for readmittance through the same gate without additional charge. Readmittance must occur before 10:00 p.m. on the same day as pass-out or the hand stamp will not be honored.

(d) Outside gate admission prices are as follows:

(1)	adult/child, 13 years of age and over	\$5.00	\$6.00
(2)	child, 6 through 12 years of age	\$1.00	
(3)	senior citizen, 65 and over	Free	
(4)	child, under 6 years of age	Free	

(e) Outside gate admission prices for advance ticket sales are as follows:

(1)	adult/child, 13 years of age and over	\$4.25	\$5.00
(2)	child, 6 through 12 years of age	\$1.00	
(3)	senior citizen, 65 and over	Free	
(4)	child, under 6 years of age	Free	

- (5) adult group sales purchasing a minimum of 40 tickets \$4.00 \$4.75
(f) The State Fair Manager may offer to exhibitors and concessionaires a reduced rate for gate admission. If offered, such discount tickets may be purchased from the administration office. Each discount ticket shall allow one admission during each day of the fair. These cards, ~~which contain punch outs for each day of the fair~~, shall be non-refundable, whether ~~punched used~~ or not, ~~to and shall~~ be used only by persons involved with concessions or exhibits, ~~not~~ and not for general admission.

Statutory Authority G.S. 106-503.

.0105 EMPLOYEE REGULATIONS

(a) ~~No employee of the State Fair shall perform the following acts:~~

- (1) ~~enter into any contract between himself and the fair other than his contract of employment with the fair;~~
(2) ~~have or acquire any financial interests, whether direct or indirect, in any contract or contractual relation between the fair and any concessionaire, exhibitor, performer, vendor or contractor;~~
(3) ~~engage or participate in business operations or dealings that might involve a conflict between his obligations and interests as a manager or employee of the fair, or the interests of the fair, and his own personal interests or the interests of his immediate family; and~~
(4) ~~be entitled to any special concessions involving the storage of vehicles or materials on the State Fair grounds or the use of fair buildings, machinery or equipment, except as may be specifically approved by the fair manager.~~

(b) ~~All vehicles used by employees of the fair in connection with the operation of the State Fair shall be the sole property of the fair to be used only on State Fair business. Vehicles donated to State Fair for the purpose of promotion shall be used only by authorization of the manager. Employees of the fair, authorized to use privately owned vehicles, shall be reimbursed according to existing regulations after submitting proper expense account forms.~~

(c) ~~No employee of the fair shall have the privilege of purchasing materials through the fair's name or on the fair's account.~~

(d) ~~The following policies as regards employment on merit and without discrimination, as established by the North Carolina Personnel Act, shall be followed by the fair:~~

- (1) ~~It shall be the policy of the fair to foster the employment of individuals in accordance with their fullest capacities, regardless of race, color, creed, religion or national origin and to safeguard~~

~~their rights to hold employment with the fair without discrimination.~~

- (2) ~~Every contract for or on behalf of the fair for materials, supplies, construction or space rental contracts for commercial sale or exhibit purposes may be canceled or terminated by the fair when discrimination on account of race, color or creed exists in the hiring or employment of common or skilled labor by the contractor pursuant to the contract.~~

Statutory Authority G.S. 106-503.

.0106 GENERAL

(a) Any person or persons who shall make, aid, countenance or assist in making any noise, riot, disturbance and all persons who shall collect in bodies or crowds on the North Carolina State Fair grounds for unlawful purposes or to the annoyance or disturbance of citizens and those attending the North Carolina State Fair or lawfully on the North Carolina State Fair grounds may be expelled from the State Fair grounds for such period of time as the manager of the fair may determine.

(b) Any person who shall appear in any street or public or exposed place on the North Carolina State Fair grounds, in a state of nudity, or dress not belonging to his or her sex, or in any indecent or lewd dress, or shall make any indecent exposure of his person, or be guilty of any obscene or filthy act, or any lewd, indecent or immoral or insulting conduct, language or behavior, or shall sell, lend, give away, distribute or in any manner attempt to do so, or show or have in his possession or offer for loan, gift or sale or distribute, lend, give or sell any obscene or indecent book, magazine, pamphlet, paper, writing, picture, drawing, photograph, or any article of lewd, obscene, immoral or indecent character or orally or otherwise give information as to where any such as above is obtainable or who shall exhibit any such to minors or procure any minor or any one else to sell, give, lend or distribute any such, shall be subject to the penalties and punishment provided in Subsection Paragraph (a) of this Rule.

(c) Any person who shall unnecessarily or

maliciously beat, abuse or injure any animal on the North Carolina State Fair grounds shall be subject to the penalties and punishment provided in Subsection Paragraph (a) of this Rule.

(d) No person shall carry from the specific area of any concession or other place of sale on the grounds of the fair, any liquid beverage in glass or metal containers, nor shall any person, when in motion about the grounds, carry any such liquid beverages in glass or metal containers. This Section shall not apply to non-alcoholic liquids brought into the fair grounds as a part of picnic meals or the like when consumed and used in a stationary locale. This Regulation is promulgated for the welfare and protection of all visitors to the State Fair and violators hereof shall be subject to the penalties provided in Subsection Paragraph (a) of this Rule.

(e) Dogs and cats are not allowed on the fair grounds unless they are under leash, are carried by the person having possession of such animal or are on display in an exhibit contracted by the fair for the specific purpose of such exhibition. All such animals not on the grounds for exhibition shall be muzzled.

Statutory Authority G.S. 106-503.

SECTION .0200 - SPACE RENTAL: COMMERCIAL EXHIBIT AND CONCESSION REGULATIONS

.0203 OCCUPANCY OF SPACE

No space shall be occupied until the deposit full payment is complete made. The original copy of the rental contract shall be signed and returned to the Space Rental Superintendent. Final payment on Concession and Commercial Exhibit Contracts is due at the Space Rental Office, Administration Building, no later than September 1. Renters of space shall keep a copy of the rental contract on the rented premises.

Statutory Authority G.S. 106-503.

.0204 FORFEITURE

Space assigned and not occupied by 8:00 a.m. on the first day of the fair, as well as all fees previously paid, shall be forfeited to the fair as liquidated damages. Any space which is not open for business or does not have an attendant at the space during the hours deemed necessary by the Space Rental Superintendent, during the nine 10 days of the fair, shall, at the option of the State Fair Manager, be forfeited. Space rental contracts shall

not be cancelled by the lessee without written notification to State Fair Manager and said written notification must be delivered to the Space Rental Superintendent no later than September 1. Refunds on cancelled space contracts shall not be made unless all provisions herein are complied with.

Statutory Authority G.S. 106-503.

.0206 EXPIRATION OF CONTRACTS

All ground leases or space contracts, unless otherwise specified, will expire with the close of the fair each year and all temporary buildings, frames, booths, etc., shall be removed seven days within 72 hours following close of fair. , otherwise they Any such items not removed shall become the property of the North Carolina State Fair.

Statutory Authority G.S. 106-503.

.0208 TIME LIMITS ON REMOVAL

No exhibit may be dismantled or removed until 8:00 a.m. 10:00 p.m. of the last day following the close of the fair. Building superintendents, gate-men and police officers shall be instructed to prevent any attempt to dismantle or remove exhibits before the hour of release. Watchmen shall be on duty in buildings until 5:00 p.m. of the day following the close of the fair. Exhibitors and concessionaires shall remove all equipment from buildings by 5:00 p.m. Monday following the close of the fair. All outside equipment and machinery shall be removed no later than seven days 72 hours following the last day of the fair; otherwise, they will become the property of the State Fair to be disposed of as the manager may deem necessary.

Statutory Authority G.S. 106-503.

.0211 SIGNS

All signs advertising any special product, whether by a trademark or otherwise, will be prohibited on the outside of any stand or building. Menus will be permitted provided they do not list any item by the manufacturer's name or trademark. The space between the ground and the counter on all four sides must be entirely free of special advertising. Soft drink distributors, bakeries, meat dealers, dairies, and all other suppliers may furnish suitable signs for the inside of stands if requested by the concessionaire. No "A" boards or free standing boards are permitted. No corrugated cardboard signs are permitted.

Statutory Authority G.S. 106-503.

.0214 LOUDSPEAKERS: ETC.

No loudspeaker, amplifier, radio or other broadcasting device is permitted on the State Fair grounds unless written permission is first obtained from the Space Rental Superintendent. Approved loudspeakers must be kept at a reasonable volume so as not to disturb normal business transactions in adjoining exhibits nor the general public. The Space Rental Superintendent reserves the right to revoke loudspeaker permission if the provisions of this Rule are not observed. Under no circumstances may loudspeakers be used before 1:00 p.m. on Sunday.

Statutory Authority G.S. 106-503.

.0216 PRICE SIGNS

On the opening day of the fair, each lessee shall cause to be posted in a conspicuous manner at the front or entrance to his place of business and at point of order and point of sale, if different locations, a neatly printed or painted sign, showing price (as approved by management) of meals, lunches, and all articles of food and drink to be sold and services performed under the contract. Lessee shall also keep displayed in plain view of the public his contract number, which will be furnished by the superintendent.

Statutory Authority G.S. 106-503.

.0218 CLEANLINESS

Purchasers Lessees of space or booth shall keep their space or booth plus the area immediately surrounding their space or booth in a clean and sanitary condition at all times by removing therefrom any filth and refuse and placing same in centralized dump locations on the fair grounds as specified by the space rental and sanitation departments. Lessee must comply with all laws and ordinances regarding disposal of waste. The use of public trash receptacles by purchasers of privileges is prohibited. Violation of this Rule may cause, in the fair manager's discretion, concession or exhibit to be closed and all fees previously paid to be forfeited. Lessee shall not throw any refuse or empty any water or other fluids on the ground or in the streets or gutters. The first violation of this Regulation shall be cause for the place of business to be closed with the forfeiture of all fees paid.

Statutory Authority G.S. 106-503.

.0220 STORAGE TRAILERS

Trailers used for storage of supplies or offices as a direct part of concessions or exhibits will be permitted to park on the fair grounds ~~provided they are parked directly behind their own concessions or exhibit and do not take up parking space of other concessionaires or exhibitors and provided they are not used for sleeping or cooking. Cars or trucks parked behind stands will pay twenty-five dollars (\$25.00) special parking permit in a location determined by the Space Rental Superintendent and must have a sticker or receipt on the trailer proving payment has been made for this privilege.~~

Statutory Authority G.S. 106-503.

.0225 GAS OR ELECTRIC SERVICE

(a) The State Fair is not responsible or liable for failure of electric service.

(b) Positively no one shall tamper with, or change, any of the general lighting in any of the State Fair buildings, and no electric connection excluding ~~wall sockets~~ plug-ins shall be made by any person not in the direct employ, or under the supervision of, the fair manager.

(c) Prices quoted for electric service, etc., ~~contemplate the ordinary job of connecting lights and appliances. Special wiring, setting motors, etc., will be charged for on a time and material basis are for having electrical power available to the Lessee. Lessee is responsible for all internal wiring and is responsible for having adapter plugs, if necessary, to connect to Fair electrical system.~~

(d) The fair manager reserves the right to terminate service if conditions of contract are violated.

Statutory Authority G.S. 106-503.

SECTION .0300 - COMPETITIVE EXHIBIT REGULATIONS

.0301 EXHIBITS AND EXHIBITORS

(a) The entry department will be open to receive and return exhibits 11 days prior to the fair and nine days following the fair, 8:30 a.m. to 6:00 p.m., except Sunday, when the department will be open from 1:00 p.m. to 6:00 p.m.

(b) Exhibit buildings will be open to the public daily between the hours of 9:00 a.m. and 9:45 p.m. during the fair.

(c) On the last night of the fair, after 9:45 p.m., exhibits may be packed up and stored for removal. No vehicle will be permitted to enter fair grounds

to remove exhibits before 8:00 a.m. of the morning following the closing of the fair. Livestock, poultry, and rabbits will have a special release time on the last day of the fair. ~~No livestock will be removed prior to 12 midnight of the last day of the fair.~~

(d) No fair superintendent or other employee shall be permitted, directly or indirectly, to make an entry in any department of the fair over which he presides or wherein he may be employed.

(e) The fair manager may limit exhibits to the facilities available at any given time.

Statutory Authority G.S. 106-503.

SECTION .0400 - OPERATION OF STATE FAIR FACILITIES

.0411 RESERVATIONS AND PAYMENT OF CHARGES

(a) A tentative reservation may be made for use of the building(s) by any organization, group, firm or individual approved by the Manager of the State Fair, subject to the availability of the facilities, without payment of any fee. Such tentative reservation shall automatically expire on the 10th day following the date upon which the tentative reservation was made.

(b) If the date for which a tentative reservation was made is sought to be reserved by any other qualified organization, group, firm or individual, then the person(s) making the tentative reservation shall be allowed 48 hours after due notice in which to execute a written contract for use of the facilities and to pay the required cash deposit which must accompany such a contract.

(c) In any event, a written contract must be executed not less than 24 hours prior to the scheduled start of any and all performance or exhibition events, at which time lessee shall make a cash deposit of not less than ~~one half of the specified "guaranteed minimum," in the case of commercial lessee, and the full amount of the specified rental charge in the case of non-commercial lessee.~~

(d) ~~Commercial lessee Lessee~~ shall be required to make full settlement of 10 percent of the gross revenue ~~or the other one half of the if greater than~~ "guaranteed minimum," ~~whichever shall be greater along with payment for any special items or services provided by the Fair,~~ within 24 hours after the end of the event for which use of the facilities was contracted. The Manager of the State Fair may extend the period for final and full settlement if, in his judgment, additional time is required to determine the accurate gross revenue.

Statutory Authority G.S. 106-503.

.0413 ALCOHOLIC BEVERAGES

(a) A person shall not sell, offer for sale, or possess for the purpose of sale, any alcoholic beverage on State Fair property, except as permitted under this Rule.

(b) A person shall not possess or consume any alcoholic beverage at ticketed, commercial events that are open to the public on State Fair property except as permitted under this Rule.

(c) Except during the annual State Fair, beer and ~~unfortified~~ wine may be sold and consumed at the ~~horse facility Gov. James B. Hunt, Jr. Horse Complex~~, subject to state alcoholic beverage control laws and regulations.

(d) Except during the annual State Fair, beer may be sold and consumed at Dorton Arena in connection with professional sporting events, subject to state alcoholic beverage control laws and regulations.

Statutory Authority G.S. 106-503.

.0414 APPLICABILITY OF REGULATIONS

~~All other regulations of the North Carolina Board of Agriculture pertaining to the operation of the State Fair and fair grounds not inconsistent with the regulations herein contained, shall be deemed applicable to facilities and the use thereof by all lessees.~~

Statutory Authority G.S. 106-503.

.0426 RENTAL RATES: FEES: AND PREMIUM BOOKS

(a) ~~Subject, in all instances, to approval by the State Board of Agriculture, the The~~ Manager of the State Fair shall annually publish:

- (1) a schedule of fees and other charges governing rental rates for State Fair properties and services; and
- (2) a premium book for exhibits and horse shows governing the awarding of cash prizes and other awards.

~~(b) The State Fair Manager shall obtain approval from the State Board of Agriculture, as required in (a) of this Rule, by January 15 of each year.~~

~~(c)~~ (b) The Board of Agriculture shall give notice of any hearing at which fees and other charges governing rental rates for State Fair properties and services ~~or premium books~~ are approved pursuant to the procedures outlined in N.C.G.S. 150B-12.

~~(d)~~ (c) Copies of fee schedules and premium

books shall be maintained in the Office of the State Fair Manager and made available to the public upon request.

Statutory Authority G.S. 106-503; 106-503.1(b).

CHAPTER 48 - PLANT INDUSTRY

SUBCHAPTER 48A - PLANT PROTECTION

SECTION .0600 - BOLL WEEVIL

.0611 PROGRAM PARTICIPATION AND PAYMENT OF FEES

All cotton farm operators in the state are hereby required to participate in the eradication program. Participation shall include timely reporting of acreage and field locations, compliance with regulations, and payment of fees. Farm operators within the elimination zone shall be notified through the extension offices or newspapers of their program costs on a per acre basis on or before March 15.

- (1) Growers are to report all planted cotton by completing a Cotton Acreage Reporting Form and paying a per acre fee at the ASCS office by July 1 of the current growing season.
- (2) The fee is nonrefundable and is to pay for the program's estimated costs as determined by the Commissioner, but will not exceed nine dollars (\$9.00) per acre.
- (3) Growers not reporting planted cotton to ASCS by July 1 of the current growing season will be assessed a three dollar (\$3.00) per acre penalty.
- (4) Growers under-reporting by more than ten percent of the actual planted acreage, as determined by ASCS, will be assessed a penalty of three dollars (\$3.00) per acre on all acreage in excess of the reported acreage.
- (5) All acreage for which fees have not been paid on or before July 15 of the current growing season will be assessed a three dollar (\$3.00) per acre penalty.
- (6) ~~Interest at 15 percent per annum will be charged on all unpaid fees and penalties from August 1 to date of payment.~~
- (7) ~~(6)~~ Fees and penalties shall be made payable to the North Carolina Department of Agriculture.

(8) ~~The Commissioner may grant a total or partial refund of penalties for extenuating circumstances, such as crop failure, crop damage or crop destruction, whether due to natural or other causes. A request for the refund of penalties, including a complete explanation of extenuating circumstances, must be provided in writing to the Plant Pest Administrator within 30 days of such payment.~~

Statutory Authority G.S. 106-65.74; 106-65.77; 106-65.88; 106-65.91.

SUBCHAPTER 48C - SEEDS

.0005 PROHIBITED SALES

The sale of any seed which contain any of the weed seeds or tubers listed below in excess of the stated limitation per pound of crop seed is prohibited:

- (1) two Purple Nutsedge and/or or Yellow Nutsedge tubers;
- (2) four Spurred Anoda, Cocklebur, Sandbur, Sicklepod, Blessed Thistle, Velvetleaf, Wild Onion and/or or Wild Garlic (in small grains or larger seeds);
- (3) eight Morning-glory;
- (4) 10 Corn Cockle;
- (5) 12 Wild Radish;
- (6) 27 Bermudagrass, Field Bindweed, Hedge Bindweed, Cornflower, Purple Nutsedge, Yellow Nutsedge, ~~seeds~~, Texas Panicum, Canada Thistle or Wild Onion and/or or Wild Garlic (in grasses and small seeded legumes);
- (7) 54 Broadleaf Dock, Curly Dock, Dodder, Giant Foxtail, Horsenettle, Wild Mustard et al, Bracted Plantain, Buckhorn Plantain or Quackgrass.

Statutory Authority G.S. 106-277.9; 106-277.15.

.0017 INSPECTION AND STOP SALE ACTION OF SEED INSPECTORS

(a) All seeds defined as "seed offered for sale" in the North Carolina Seed Law, including seeds in containers bearing seed tags issued by a recognized certifying agency, are subject to inspection and all other provisions of the North Carolina Seed Law and ~~these the rules and Regulations adopted thereunder by the Board of Agriculture.~~

(b) Upon determining a lot of seeds is in violation of the North Carolina Seed Law, the official seed inspector is authorized to issue a stop-sale

order on said lot of seed. The stop-sale order shall contain the complete identification of the seed lot and the number of bags or containers under stop-sale.

(c) When a stop-sale order is issued on a lot of seed, the inspector shall attach a stop-sale tag to each one bag or container of said lot. and shall remove the North Carolina seed analysis tag and any other tag that may indicate an incorrect analysis of the contents of the bag or container. The stop-sale tag shall not be removed, nor any bags or containers of the lot sold or removed from the premises, until permission to do so is obtained from the Commissioner of Agriculture or his authorized agent.

Statutory Authority G.S. 106-277.15.

.0020 TAGS AND LABELS AND STAMPS

(a) Every container of agricultural or vegetable seed containing 10 pounds or more of seed shall have attached thereto an official North Carolina a seed analysis tag, bearing the information as required by law (G.S. 106-277.3).

(b) The seedman's statement of analysis may be placed on the back side of the seed analysis tag, providing the tag bears a name with address.

(c) (b) The seedman's statement of analysis shall include all tag and label requirements as provided in the law (G.S. 106-277.3). Incomplete labeling is a violation of the seed law Seed Law.

(d) (c) When no statement is made on the seed tag as to the name and number of noxious weed seed per pound of crop seed, it shall be considered equivalent to the statement, "none." The words "None in Excess" or similar phrases, are prohibited.

(e) The official North Carolina seed analysis tags prescribed and made available by the Commissioner shall be white or manila, red, and yellow. The red and yellow tags shall be limited in use to official seed inspectors.

(f) The official North Carolina seed stamp prescribed and made available by the Commissioner may be used in lieu of the official North Carolina seed analysis tag. The official stamp may be placed on a seedman's label which contains all the information required by law (G.S. 106-227.3), such stamp to be in evidence that the revenue pertaining to the official North Carolina Seed Analysis Tag has been paid.

Statutory Authority G.S. 106-277.15.

.0021 RESPONSIBILITY FOR OBTAINING

NEW GERMINATION TEST

The person in possession of any seed offered for sale, or exposed for sale for seeding purposes, shall be responsible for securing a new germination test when the test date prior to sale, or exposure for sale, shows the nine month period required by law has expired. The seed shall be relabeled or new seed analysis tags attached in compliance with the North Carolina Seed Law.

Statutory Authority G.S. 106-277.15.

.0023 ANALYSIS FOR FARMERS OR SEEDMEN

(a) The germination and purity analyses of agricultural and vegetable seeds shall be free to any person residing within the state. However, the Seed Program Administrator shall have the privilege, with the approval of the Commissioner of Agriculture and the Board of Agriculture, of limiting the number of such free tests made annually, or during certain seasons, for any one person and of designating the time or dates when such samples will be accepted for testing. The Seed Administrator may refuse to analyze any sample of seeds submitted for testing that has not been reasonably well cleaned, or does not comply with these Rules.

(b) A fee of five dollars (\$5.00) per sample (100 seeds) shall be charged to any North Carolina citizen who requests the tetrazolium chloride (T.Z.) test. This test shall be limited to wheat, oats, barley and rye seeds from the period July 1 to November 1 of each year, and to peanuts, soybeans, corn and cotton seeds from the period of December 1 through June 30 of each year. The Seed Administrator shall have authority to accept special problem samples of other species for T.Z. tests.

(c) The Seed Program Administrator shall have authority to accept special problem samples of other species for T.Z. tests and to refuse to analyze any sample of seeds submitted for testing that has not been reasonably well cleaned, or does not comply with these rules.

(d) (c) Fees for in-state testing of tall fescue and other grass seeds and plant tissues for the presence of fungal endophytes are as follows:

- (1) fifteen dollars (\$15.00) per sample for seeds;
- (2) fifteen dollars (\$15.00) per sample for plant tissue analysis;
- (3) twenty-five dollars (\$25.00) per sample for seeds which require seedling production.

(e) (d) Fees for out-of-state testing of tall fescue and other grass seeds and plant tissues for the presence of fungal endophytes are as follows:

- (1) thirty-five dollars (\$35.00) per sample for seeds;
- (2) twenty-five dollars (\$25.00) per sample for plant tissue analysis;
- (3) forty-five dollars (\$45.00) per sample for seeds which require seedling production.

(f) (e) The fee for testing small grain seed for Loose Smut shall be fifteen dollars (\$15.00) per sample.

Statutory Authority G.S. 106-277.15.

.0024 IDENTIFICATION AND SIZE OF SAMPLES FOR SERVICE TESTING

When submitting seed samples for analysis, the person shall comply with the following:

- (1) Identification
 - (a) Samples shall be plainly addressed to the North Carolina Department of Agriculture, Seed Laboratory, P.O. Box 27647, Raleigh, North Carolina 27611-7647;
 - (b) Samples identified with a lot number;
 - (c) Kind and variety of seed; If the seed has been treated, the name of the substance used;
 - (d) Name and address of sender;
 - (e) A letter of notification of shipment sent in separate mail or attached to package of seeds when carrying proper postage;
 - (f) Samples should be sent in substantial containers, and properly packed for mailing or shipping in order that they will arrive intact and without damage to the contents.
- (2) Size of Samples. When sending samples to the State Seed Laboratory, the following are the minimum weights of samples to be submitted for complete analysis. Samples of seed that do not conform to these requirements may not be tested:
 - (a) one-half ounce of tobacco seed;
 - (b) two ounces of white, alsike or hop clovers and small grass seeds;
 - (c) five ounces of red or crimson clover, alfalfa, lespedeza, ~~rye~~ grasses ~~ryegrasses~~, fescues, ~~orchard~~ grass ~~orchardgrass~~, millet or seeds of similar size and weight;
 - (d) one pound of cotton, ~~sudan~~ grass

sudangrass, sorghums, or seeds of similar size;

- (e) two pounds of corn, wheat, oats, barley, rye, beans, peas, cowpeas, soybeans, vetches and seeds of similar or larger size.

Statutory Authority G.S. 106-277.15.

CHAPTER 52 - VETERINARY DIVISION

SUBCHAPTER 52B - ANIMAL DISEASE

SECTION .0500 - POULTRY DISEASES

.0502 HEALTH REGULATIONS FOR POULTRY EXHIBITIONS

(a) Persons conducting and participating in poultry exhibitions shall comply with the following:

- (1) All chickens and turkeys for exhibition in North Carolina shall originate from U.S. pullorum-typoid clean or equivalent flocks, or have a negative pullorum-typoid test within 90 days (30 days for out-of-state birds) of the date of exhibition. All North Carolina owned birds must be tested by agents of the North Carolina Department of Agriculture. For North Carolina Birds and for out-of-state birds from U.S. pullorum-typoid clean states, these test requirements may be satisfied by a negative test conducted by a North Carolina Department of Agriculture agent at the time of entry. The fee for pullorum-typoid testing at the exhibition will be six eight cents (\$0.06) (\$0.08) per bird with a minimum fee of one dollar (\$1.00) per exhibitor.
- (2) Poultry for exhibition shall not have been vaccinated with a live virus vaccine within the last 30 days preceding the exhibition.
- (3) Each bird must be identified with a "tamper-proof" band at the time of pullorum-typoid test. A copy of the pullorum-typoid test chart must accompany birds to exhibition.
- (4) Birds are subject to examination (including blood test and swabs) by a representative of the North Carolina Department of Agriculture. Birds will not be accepted which are infected with

- or showing any clinical signs of a contagious disease, or are infested with lice and/or mites.
- (5) Out-of-state birds will be admitted provided they are from an area that is not under quarantine for an infectious disease and satisfy the requirements of this Rule.
- (6) The secretary of each show will furnish the representative of the State Veterinarian with a list of names and addresses of all exhibitors at the time of the exhibition.
- (7) The secretary of each show will have these requirements printed in the show catalog or premium list.
- (b) The Commissioner may, when in the public interest to prevent disease, suspend any poultry exhibition in North Carolina.

Statutory Authority G.S. 106-539; 106-540; 106-543; 106-548.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to adopt rules cited as 10 NCAC 14A .1401-.1403; .1501-.1505; 1601-.1605; .1701-.1703; .1801-.1810; 1901-.1904; .2001-.2006; .2101-.2105; .2201-.2208; .2301-.2304; .2401-.2405; .2501-.2507; .2601-.2603; .2701-.2702; .2801; .2901-.2903; 10 NCAC 14J .0210; amend 10 NCAC 14J .0201; .0203-.0207; 10 NCAC 14L .0407; repeal 10 NCAC 14A .1301-.1313; .1315-.1317.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 1:00 p.m. on August 4, 1993 at the Sheraton Inn, 4504 Creedmoor Road at Crabtree Valley Mall, President's Room 1, Raleigh, N.C.

Reason for Proposed Action:

- 10 NCAC 14A .1301-.1313 - Proposed repeal of current standards contained in 10 NCAC 14A .1301-.1313.**
- 10 NCAC 14A .1315-.1317- Proposed repeal of**

current standards contained in 10 NCAC 14A .1314-.1317.

10 NCAC 14A .1401-.2903 - Proposed adoption of standards contained in 10 NCAC 14A .1401-.2903. Minimum rules were adopted in 1979 for the development of a mental health and mental retardation delivery system. As that system has grown, more specific rules are now indicated to assure the quality of services within the Department of Corrections is commensurate with those standards developed for community programs.

10 NCAC 14J .0201, .0203-.0207 - Proposed amendments - The proposed changes are to clarify the distinct uses of restraint and seclusion; to shorten the period of time before a restrained or secluded client shall be seen by a qualified professional.

10 NCAC 14J .0210 - Proposed adoption - To modify North Carolina Standards to reflect National Standard of Care; clarify State's obligation to heed manufacturer's warning regarding restraint devices.

10 NCAC 14L .0407 - Amend Rule to eliminate requirement that each client be employed for 20 or more hours per week. To comply with federal regulations on Supported Employment (34 CFR Parts 361, 363, 376 and 380, dated June 24, 1992 and effective August 8, 1992). (In determining whether the client has met all of the criteria under Supported Employment, the hours worked should no longer be considered).

Comment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement. Persons wishing to make oral presentations should contact Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 N. Salisbury St., Raleigh, N.C., 27603, 919-733-4774, before August 3, 1993. Comments submitted as a written statement must be sent to the above address no later than August 2, 1993, and must state the Rules to which the comments are addressed. Time limits for oral remarks may be imposed by the Commission Chairman. Fiscal information regarding these Rules is available from this Division, upon request.

CHAPTER 14 - MENTAL HEALTH: GENERAL

SUBCHAPTER 14A - IDENTIFYING INFORMATION

**SECTION .1300 - NORTH CAROLINA
DEPARTMENT OF CORRECTION:
DIVISION OF PRISONS: STANDARDS
FOR MENTAL HEALTH, MENTAL
RETARDATION
AND SUBSTANCE ABUSE SERVICES**

.1301 SCOPE

The standards contained within this Section shall apply to the delivery of mental health, mental retardation, alcohol and drug abuse services to incarcerated inmates by the Department of Correction, division of prisons, or by any other provider of services on a contract basis, which are delivered within the correctional system.

Statutory Authority G.S. 148-19(d).

.1302 DEFINITIONS

The following terms shall have the meanings specified unless the context clearly requires a different meaning:

- (1) **Administering Medication.** The giving of a unit dose of a drug to a patient as a result of a lawful order; Administering affects only one patient and is not restricted to licensed pharmacists;
- (2) **Agency.** A local, regional, institutional or state organization defined by law, charter or license to provide human services;
- (3) **Clinical Staff Member.** Any employee of the mental health and mental retardation services system who has a part in providing treatment to an inmate;
- (4) **Continuity of Care.** The continued meeting of the client's needs regardless of changes in status or location;
- (5) **Dispensing Medication.** Includes, but is not limited to, issuing to a client, or to a person acting on his behalf, one or more unit doses of a drug in a suitable container with appropriate labeling; While including compounding, dispensing also includes the act of packaging a drug, either from a bulk container or as a result of compounding, in a container other than the original container of the manufacturer or distributor, and labeling the new container with all the information required by state and federal law. Except for physicians and under specified conditions, physician extenders, the act of dispensing is limited by law to licensed

pharmacists and persons working under their immediate supervision and may not be performed by a nurse or other non pharmacist except under the immediate, direct, and personal supervision of a licensed pharmacist. The filling or refilling of drug containers from nursing stations or other service areas with the drugs called for, or the furnishing of a drug to such areas, is dispensing;

- (6) **Follow Up Service.** Provision for a continuing relationship with the client for the purpose of assuring that changing needs are recognized and appropriately met;
- (7) **Inpatient Services.** Care or treatment rendered to an inmate in any therapeutic setting where the individual is actually provided with a bed and housed overnight; Services include, but are not limited to, short term medical psychiatric stabilization as well as intermediate and long term medical, psychiatric, social, psychological, educational and other supportive care required for individuals who cannot function without intense supervision in a controlled environment;
- (8) **Medication:**
 - (a) substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;
 - (b) substances intended for use in the diagnostic, cure, mitigation, treatment, or prevention of disease in man or other animals;
 - (c) substances (other than food) intended to affect the structure or any function of the body of man or other animals; and
 - (d) substances intended for use as a component of any article specified in (a), (b), or (c) of this Subdivision; but does not include devices or their components, parts, or accessories;
- (9) **Mental Health Program Director.** Any individual who is responsible for the operation of a mental health and mental retardation services system program;
- (10) **Mental Health Records.** Any documentation pertaining to treatment received within the mental health services system which is kept separate and apart

- from those formal entries in the inmate's outpatient medical record;
- (11) Mental Health Services System. A mechanism by which mental health treatment is provided to inmates within the North Carolina division of prisons;
- (12) Mental Retardation. Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period;
- (13) Outpatient Services. Care or treatment rendered to an inmate in any therapeutic setting where the individual is not housed overnight;
- (14) Patient. A person who is mentally ill, mentally retarded, an alcoholic or drug abuser related to his physical or mental impairment, or an agency or group seeking services for the prevention or reduction of these conditions; The terms "client" and "inmate" are occasionally used in place of "patient" in appropriate sections of the standards;
- (15) Program. An organized response to prevent, contain, reduce or eliminate one or more human problems or conditions;
- (16) Standard. Something established by authority, custom, or general consent as a model or example; something set up and established by authority as a rule for the measure of quantity, quality, and value;
- (17) System. An organized or established procedure.

Statutory Authority G.S. 148-19(d).

.1303 ACCESS TO PROFESSIONAL SERVICES

Each inmate shall have access to the appropriate mental health professional as determined by his needs.

Statutory Authority G.S. 148-19(b), (d).

.1304 MEDICAL RECORDS

(a) There shall be a written record maintained for every inmate undergoing active mental health treatment.

(b) The record shall contain sufficient information to clearly identify the inmate, justify the diagnosis and treatment, and record the results. Records shall be current, active, and confidential.

(c) The facility shall maintain an inmate record service which will provide adequate, accessible records containing easily retrievable information.

Statutory Authority G.S. 148-19(d).

.1305 CONTINUITY OF CARE

(a) The Division of prisons shall insure that there will be continuity of care for all inmates receiving mental health services.

(b) There shall be a system of referral for potential and active patients for the purpose of entering and continuing treatment.

(c) There shall be a system to provide for the orderly discharge of patients from treatment, the distribution of discharge information, and, to the extent feasible, the observation of behavior following discharge.

(d) The Division of prisons shall cooperate in establishing among the Department of Human Resources, division of prisons, division of adult probation and parole, and other service agencies a system which will facilitate continuity of care for inmates released from confinement who desire continued treatment.

Statutory Authority G.S. 148-19(a),(b),(d).

.1306 MEDICATION

There shall be a system to insure that each inmate will receive his prescribed medication regardless of his assigned location. Procedures for dispensing and administering controlled substances shall be in compliance with federal and state regulations.

Statutory Authority G.S. 148-19(d).

.1307 CONFIDENTIALITY

(a) All information contained in an inmate's mental health record shall be considered privileged and confidential with the exception of information considered matters for public record.

(b) An inmate's name, age, sex, race, offense for which convicted, court where sentenced, length of sentence, date of sentencing, date of arrival, date of transfer from prison, program placement and progress, conduct grade, custody classification, disciplinary offenses and disposition, escapes and recaptures, dates regarding release and the presence or absence of detainees shall be considered matters of public record.

(1) Each Mental Health Program Director shall insure confidentiality of inmate mental health records. Only mental

- health clinicians having direct responsibility for the inmate and his treatment plan and clerical personnel having specific record responsibilities shall have access to the inmate's mental health records. These records shall be kept separate from administrative folders and appropriately secured. No employee, management committee member or volunteer, except those personnel specified above shall have access to an inmate's mental health record without written authorization from the Mental Health Program Director or his designee.
- (2) Each Mental Health Program Director shall insure that information contained in inmate mental health records shall not be released to other than approved outside agencies or individuals:
- (A) Information contained in inmate mental health records may be released to an attending psychologist, psychiatrist, or governmental agencies directly involved in mental health treatment upon written consent of the inmate.
- (B) Individuals involved in approved teaching, staff development, evaluation and research projects may have access to inmate mental health records as long as the proper precautions are taken to disguise the identities of the inmates.
- (C) Confidential information within an inmate's mental health record may be released without written consent to other individuals employed in the Department of Correction only when and to the extent that the performance of their duties require that they have access to such information. If an individual is being considered for parole, a summary of the contents of his record shall be made available, upon request, to the Parole Commission.
- (3) Confidential information shall be disclosed without the inmate's written authorization to the extent that the clinician reasonably determines that such disclosure is necessary to protect against clear and substantial risk of imminent serious injury, disease, or death being inflicted by the inmate on

- himself or others, or a threat to the security of the unit.
- (4) All standards applying to confidentiality shall also apply to those individuals and agencies providing contractual services to the North Carolina division of prisons.
- (5) The North Carolina division of prisons recognizes the more restrictive nature of the Federal HEW alcohol and drug abuse confidentiality regulations and shall comply with, and educate its employees in regard to, these regulations.

Statutory Authority G.S. 148-19(d).

.1308 INPATIENT SERVICES

(a) The North Carolina division of prisons shall provide an inpatient mental health services for inmates identified as needing these services.

(b) All referrals to the inpatient facility shall be channeled through the appropriate outpatient services system. Written policies and procedures for admission to the inpatient facility shall be made available to the outpatient services system.

(c) The mental health professional staff shall have the responsibility for screening inmates referred to the inpatient facility to determine the appropriateness of the referral. The physician staff members of the inpatient facility shall have the authority to admit inmates to the inpatient facility.

(d) Inpatient services shall be provided in a therapeutic setting.

(e) The Division of Prisons shall provide appropriate and qualified mental health staff to the inpatient facility.

(f) There shall be written procedures for the functioning of the inpatient facility. These procedures shall cover:

- (1) initial assignment, transfers, and any movement into or out of the facility;
- (2) coordination and collaboration among staff members within the inpatient facility;
- (3) the administering of prescribed medication; and
- (4) staffing patterns.

(g) Upon discharge from the inpatient facility, and with the patient's permission, appropriate follow up shall be arranged by the staff of the inpatient facility.

Statutory Authority G.S. 148-19(d).

.1309 OUTPATIENT SERVICES

- (a) The North Carolina division of prisons shall provide outpatient mental health services for inmates identified as needing these services.
- (b) It shall be the responsibility of all division of prisons employees to refer for mental health services screening those inmates who show behavior suggesting a need for such services.
- (c) The mental health professional staff shall have the responsibility of screening the individuals referred to determine the level of intervention required.
- (d) Adequate outpatient mental health treatment shall be provided by the Division of prisons to those inmates found to be in need and who indicate a willingness to accept such treatment.

Statutory Authority G.S. 148-19(d).

.1310 ENVIRONMENTAL STRESS

Inmates under active mental health treatment shall be housed in the least stressful environment appropriate for treatment and available in the Division of prisons.

Statutory Authority G.S. 148-19(a),(b),(d).

.1311 DRUG AND ALCOHOL ABUSE SERVICES

- (a) The Division of prisons shall provide services for drug and alcohol abusers.
- (b) The Division of prisons shall develop, implement, and coordinate drug and alcohol abuse services or shall contract for such services.
- (e) There shall be a system of patient identification, referral, service delivery, and follow up care.

Statutory Authority G.S. 148-19(d).

.1312 MENTAL RETARDATION SERVICES

- (a) The Division of prisons shall provide services for the mentally retarded.
- (b) There shall be a system of identification of mentally retarded inmates in need of services.
- (e) There shall be a system of referral to services for the mentally retarded including, but not limited to, the following:
- (1) adult work activity programs for substantially handicapped mentally retarded inmates;
- (2) an appropriate and qualified staff person to assist each mentally retarded inmate in coping with institutional stress; and

- (3) a follow up service developed in conjunction with the Department of Human Resources and the Division of Adult Probation and Parole to provide the mentally retarded inmate with continuity of care following release.

Statutory Authority G.S. 148-19(d).

.1313 EMERGENCY SERVICES

- (a) Emergency mental health services shall be provided.
- (b) The mental health emergency services plan shall include a primary and secondary system to insure the availability of emergency services.
- (e) Emergency services shall be coordinated with other elements of the mental health services system to insure continuity of care.

Statutory Authority G.S. 148-19(a),(b),(d).

.1315 RIGHT TO TREATMENT/RIGHT TO REFUSE TREATMENT

- (a) An inmate has a right to receive mental health treatment and a right to refuse such treatment except as provided in Paragraph (b) of this Rule.
- (b) When an inmate refuses to receive treatment, treatment may be forced only in accordance with procedures described in the Division of Prison's Health Care Procedures Manual.

Statutory Authority G.S. 148-19(d).

.1316 STAFF TRAINING

- (a) The Division of prisons shall have the responsibility of providing in-service training so that its employees will be capable of providing the necessary support to the mental health treatment staff.
- (b) Employees shall receive training in recognizing behavior which identifies an inmate as one who should be referred to the mental health services delivery system and shall be trained in the proper referral procedure.
- (e) Employees shall receive training in managing the behavior of inmates identified as having mental health disabilities.
- (d) Employees shall receive training in the importance of the proper distribution and control of prescribed medication.
- (e) Employees shall receive training in maintaining the confidentiality of mental health information.

Statutory Authority G.S. 148-19(a),(b),(d).

.1317 PROFESSIONAL DEVELOPMENT

- (a) The Division of prisons shall provide opportunities for the professional development of its mental health services system staff.
- (b) Professional development shall include opportunities for increasing skills through in-service training and opportunities to attend appropriate seminars and short courses offered by professional organizations and institutions of higher learning.

Statutory Authority G.S. 148-19(d).

SECTION .1400 - SCOPE AND DEFINITIONS

.1401 SCOPE

This Subchapter sets forth standards for the delivery of mental health and mental retardation services to inmates in the custody of the Department of Correction. These standards shall apply to such services provided to inmates by the Department or by any other provider of services on a contractual basis.

Statutory Authority G.S. 148-19(d).

.1402 REQUIRED SERVICES

- (a) The Department shall provide or contract for mental health and mental retardation services.
- (b) Such services, which address the needs of the client as assessed by a clinician, shall include, but need not be limited to:
- (1) emergency;
 - (2) prevention;
 - (3) outpatient;
 - (4) residential; and
 - (5) inpatient.

Statutory Authority G.S. 148-19(d).

.1403 DEFINITIONS

For the Rules contained in this Subchapter, the following definitions apply:

- (1) "Administering medication" means direct application of a medication whether by injection, inhalation, ingestion, or any other means to the client.
- (2) "Admission" means acceptance of an inmate for mental health and mental retardation services in accordance with Department procedures.
- (3) "Area" means one of the six geographic

- catchment areas designated by the Department for administrative purposes.
- (4) "Area program" means a public agency providing mental health, developmental disabilities and substance abuse services for a catchment area designated by the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services.
- (5) "Chief of Mental Health Services" means the individual who is responsible for the development, provision and monitoring of mental health and mental retardation services in the Department's Division of Prisons. His duties include ensuring compliance with statutory and professional standards for services.
- (6) "Client" means an inmate who is admitted to and is receiving mental health or mental retardation services.
- (7) "Client care evaluation study" means evaluation of the quality of services by measuring actual services against specific criteria through collection of data, identification and justification of variations from criteria, analysis of unjustified variations, corrective action, and follow-up study.
- (8) "Client record" means a written account of all mental health and mental retardation services provided to an inmate from the time of acceptance of the inmate as the client until termination of services. This information is documented on standard forms which are filed in a standard order in an identifiable folder.
- (9) "Clinician" means a psychiatrist, physician, or psychologist.
- (10) "Commission" means the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services, established under Part 4 of Article 3 of Chapter 143B of the General Statutes.
- (11) "Contract agency" means an entity with which the Department contracts for a service as defined in the standards exclusive of intermittent purchase of service for an individually identified client.
- (12) "Department" means the Department of Correction.
- (13) "DHR" means the Department of Human Resources.
- (14) "DHR review team" means the staff delegated by the Department of Human Resources to monitor the implementation

- of standards in accordance with the provisions of G.S. 148-19(d).
- (15) "Direct care staff" means staff who provide care, treatment, or habilitation services to the client on a continual and regularly scheduled basis.
- (16) "Disability group" means two or more inmates who are either mentally ill or mentally retarded.
- (17) "Discharge" means the termination of mental health or mental retardation services to the client.
- (18) "Dispensing medication" means issuing for the client one or more unit doses of a medication in a suitable container with appropriate labeling.
- (19) "Documentation" means provision of written, dated and authenticated evidence of the delivery of services to the client or compliance with standards.
- (20) "emergency service" means a service which is provided on a (24-hour, non-scheduled basis to inmates for immediate screening and assessment of presenting problems. Crisis intervention and referral to other services are provided as indicated.
- (21) "Facility" means the physical area, where mental health or mental retardation services are provided, including both buildings and grounds, under the auspices of the Department.
- (22) "Habilitation" means education, training, care and specialized therapies undertaken to assist a mentally retarded client in achieving or maintaining progress in developmental skills.
- (23) "Habilitation plan" means an individualized, written plan for the client who is mentally retarded which includes measurable, time-specific objectives based on evaluations, observations, and other assessment data. The plan is based on the strengths and needs of the client and identifies specific staff responsibilities for implementation of the plan.
- (24) "Health professional" means a staff member trained in the delivery of medical or mental health services.
- (25) "Inmate" means an incarcerated individual who remains in the custody of the Department.
- (26) "Inpatient service" means a service provided on a 24-hour basis. Client care is provided under the clinical direction of a physician or doctoral level psychologist. The service provides continuous, close supervision for the client with moderate to severe mental health problems.
- (27) "Legend drug" means a drug that must be dispensed with a prescription.
- (28) "Medication" means a substance in the official "United States Pharmacopoeia" or "National Formulary" intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or intended to affect the structure or any function of the body.
- (29) "Mental health program director" means the individual who is responsible for the operation of mental health and mental retardation services for inmates.
- (30) "Mental illness" means the term as defined in G.S. 122C-3.
- (31) "Mental retardation" means the term as defined in G.S. 122C-3.
- (32) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.
- (33) "Officer in charge" means the correctional officer who has designated responsibility for the custody and safekeeping of inmates in the facility.
- (34) "Outpatient service" means a service designed to meet the diagnostic and therapeutic needs of the client residing with the regular inmate population. Individual counseling, psychotherapy, extended testing and evaluation, and medication therapy are provided as needed.
- (35) "Peer review" means the formal assessment by professional staff of the quality and efficiency of services ordered or performed by other professional staff.
- (36) "Physician" means a medical doctor who is licensed to practice medicine in the State of North Carolina.
- (37) "Prevention service" means a service provided to the prison population. Service activities include counseling, information, instruction, and technical assistance with the goals of preventing dysfunction and promoting well being.
- (38) "Privileging" means a process by which each staff member's credentials, training and experience are examined and a determination made as to which treatment or habilitation modalities the staff member is

- qualified to provide.
- (39) "Program evaluation" means the systematic documented assessment of program objectives to determine the effectiveness, efficiency, and scope of the system under investigation, to define its strengths and weaknesses and thereby to provide a basis for informed decision-making.
- (40) "Protective device" means an intervention that provides support for a medically fragile client or enhances the safety of the client with self-injurious behavior. Such device may include geri-chairs or tabletop chairs to provide support and safety for the client with a major physical handicap; devices such as seizure helmets or helmets and mittens for self-injurious behaviors; or a device such as soft ties used to prevent a medically ill client from removing intravenous tubes, indwelling catheters, cardiac monitor electrodes, or similar medical devices.
- (41) "Psychiatric nurse" means an individual who is licensed to practice as a registered nurse in the State of North Carolina by the North Carolina Board of Nursing and who is a graduate of an accredited master's level program in psychiatric mental health nursing with two years of nursing experience, or has a master's degree in behavioral science with two years of supervised clinical experience, or has four years of experience in psychiatric mental health nursing.
- (42) "Psychiatrist" means a physician who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.
- (43) "Psychologist" means an individual who is licensed as a practicing psychologist or a psychological associate in the State of North Carolina or one exempt from licensure requirements who meets the supervision requirements of the North Carolina Board of Examiners of Practicing Psychologists.
- (44) "Psychotherapy" means a form of treatment of mental illness or emotional disorders which is based primarily upon verbal interaction with the client. Treatment is provided by a trained professional for the purpose of removing or modifying existing symptoms, of attenuating or reversing disturbed patterns of behavior, and of promoting positive personality growth and development.
- (45) "Psychotropic medication" means medication given with the primary intention of treating mental illness. These medications include, but are not limited to, antipsychotics, antidepressants, minor tranquilizers and lithium.
- (46) "Qualified mental health professional" means any one of the following: psychiatrist; psychiatric nurse; psychologist; psychiatric social worker; an individual with a master's degree in a related human service field and two years of supervised clinical experience in mental health services; or an individual with a baccalaureate degree in a related human service field and four years of supervised clinical experience in mental health services.
- (47) "Qualified mental retardation professional" means an individual who holds at least a baccalaureate degree in a discipline related to developmental disabilities and who has at least one year of experience in working with mentally retarded clients.
- (48) "Qualified professional" means a qualified mental health professional or a qualified mental retardation professional.
- (49) "Qualified record manager" means an individual who is a graduate of a curriculum accredited by the Committee on Allied Health Education and Accreditation of the American Medical Association and the Council on Education of the American Health Information Management Association and who is currently registered or accredited by the American Health Information Management Association.
- (50) "Quality assurance" means a process for objectively and systematically monitoring and evaluating the quality, appropriateness, and effectiveness of mental health and mental retardation services provided and the degree to which those services meet the identified needs and intended goals for the client.
- (51) "Release" means the completion of an inmate's active sentence and return to the community.
- (52) "Research" means inquiry involving a

- trial or special observation made under conditions determined by the investigator to confirm or disprove a hypothesis, or to explicate some principle or effect.
- (53) "Residential service" means a service provided in a designated treatment setting where 24-hour supervision is an integral part of the care, treatment, habilitation or rehabilitation provided to the client.
- (54) "Responsible clinician" means the psychologist, psychiatrist, or physician designated as responsible for the client's treatment. This may include a clinician designated as on-call for the facility.
- (55) "Restraint" means limitation of the client's freedom of movement with the intent of controlling behavior by mechanical devices which include, but are not limited to, cuffs, ankle straps, or sheets. For purposes of these rules, restraint is a therapeutic modality and does not include protective devices used for medical conditions or to assist a non-ambulatory client to maintain a normative body position, or devices used for security purposes.
- (56) "Seclusion" means isolating the client in a separate locked room or a room from which he cannot exit for the purpose of controlling the client's behavior. For purposes of these rules, seclusion is a therapeutic modality and does not include segregation for administrative purposes.
- (57) "Service" means an activity or interaction intended to benefit an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.
- (58) "Service delivery site" means any area, correctional institution, residential unit, or inpatient unit operated by the Department where mental health and mental retardation services are provided.
- (59) "Social worker" means an individual who holds a master's degree in social work from an accredited school of social work and has two years of clinical social work experience in a mental health setting or who is a clinical social worker certified by the North Carolina Certification Board for Social Work.
- (60) "Standards" means minimum standards for the delivery of mental health and mental retardation services to clients, prescribed by the Commission for Mental
- Health, Developmental Disabilities and Substance Abuse Services and codified in 10 NCAC 14A .1400 through .2900.
- (61) "State facility" means a facility operated by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services and which provides mental health, mental retardation or substance abuse services.
- (62) "Support service" means a service provided to enhance the client's progress in his primary treatment or habilitation program.
- (63) "Testing services" means the administration and interpretation of the results of standardized instruments for the assessment, diagnosis or evaluation of psychological or developmental disorders.
- (64) "Treatment" means the process of providing for the physical, emotional, psychological, and social needs of the client through services.
- (65) "Treatment plan" means an individualized, written plan of treatment for a mentally ill client. The plan contains time-specific goals and strategies for implementing the goals, and identifies direct care staff responsible for the provision of treatment services to the client.
- (66) "Waiver" means a situation in which the commission determines that a specific prison site is not required to comply with a specific standard. A waiver is granted according to the provisions of 10 NCAC 14B .0500.

Statutory Authority G.S. 148-19(d).

SECTION .1500 - ORGANIZATIONAL RESPONSIBILITIES

.1501 COORDINATION AND DELIVERY OF SERVICES

The Department shall develop and implement a plan to ensure coordination in the delivery of all mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

.1502 ORGANIZATIONAL CHART

The organizational chart of the Department shall clearly articulate the channels of responsibility in implementing and ensuring the coordination of mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

.1503 DISTRIBUTION OF STANDARDS

The Department shall distribute to all service delivery sites adequate copies of the Rules of this Subchapter and any subsequent revisions to these Rules as they occur.

Statutory Authority G.S. 148-19(d).

.1504 COMPLIANCE WITH RULES

(a) The Department shall conduct an annual internal evaluation of compliance with Commission standards in each service delivery site.

(b) The evaluation report shall be made available to the DHR review team.

Statutory Authority G.S. 148-19(d).

.1505 GRIEVANCE RULE

The Department shall develop and implement a rule which identifies procedures for review and disposition of grievances regarding mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

SECTION .1600 - REQUIRED STAFF

.1601 PSYCHIATRIST

Each service delivery site shall employ, or contract for, the services of a psychiatrist to ensure the client's accessibility to services which require the judgment and expertise of a psychiatrist.

Statutory Authority G.S. 148-19(d).

.1602 PSYCHOLOGIST

Each service delivery site shall employ, or contract for, the services of a psychologist to ensure the client's accessibility to services which require the judgement and expertise of a psychologist.

Statutory Authority G.S. 148-19(d).

.1603 REGISTERED NURSE

Each service delivery site shall employ, or contract for, a qualified registered nurse to ensure that the client is given the nursing care that requires the judgment and specialized skills of a registered nurse.

Statutory Authority G.S. 148-19(d).

.1604 SOCIAL WORKER

Unless exempted by the Chief of Mental Health Services, based on size and mission of the facility, each service delivery site shall employ, or contract for, social work staff to ensure the client's accessibility to services which require the knowledge and expertise of a social worker.

Statutory Authority G.S. 148-19(d).

.1605 SUPPORT STAFF

Each service delivery site shall have support staff to ensure the delivery of mental health and mental retardation services to clients. This includes, but need not be limited to, clerical staff.

Statutory Authority G.S. 148-19(d).

SECTION .1700 - ORGANIZATIONAL RELATIONS

.1701 COORDINATION OF SERVICES

The Department shall develop and implement procedures to facilitate cooperative working relationships between the staff of mental health and mental retardation services, custody personnel, and other service staff to facilitate the provision of services for inmates who are mentally ill or mentally retarded.

Statutory Authority G.S. 148-19(d).

.1702 INFORMATION AND OUTREACH SERVICES

The Department shall provide, to correctional staff, information designed to promote awareness of mental health and mental retardation services available to inmates within the Department.

Statutory Authority G.S. 148-19(d).

.1703 AGREEMENT WITH THE DEPARTMENT OF HUMAN RESOURCES

The Department shall have a written agreement with the Department of Human Resources regarding mutual responsibilities for mental health and mental retardation services to inmates under Department supervision.

Statutory Authority G.S. 148-19(d).

SECTION .1800 - QUALITY ASSURANCE

.1801 SCOPE

(a) Quality assurance shall be a continuing responsibility of the Department and each service delivery site that offers mental health and mental retardation services.

(b) Quality assurance activities shall include, but need not be limited to:

- (1) clinical and professional supervision and privileging;
- (2) client care evaluation studies;
- (3) record review;
- (4) utilization and peer review;
- (5) employee education and training;
- (6) program evaluation; and
- (7) evidence of corrective action.

Statutory Authority G.S. 148-19(d).

.1802 QUALITY ASSURANCE PLAN

(a) The Department shall establish and implement a written quality assurance plan for mental health and mental retardation services that describes how quality assurance activities will be carried out.

(b) Quality assurance activities shall include, but need not be limited to, the following:

- (1) an objective and systematic process for monitoring and evaluating the quality and appropriateness of client care, incorporating a review of significant incidents, which may include but need not be limited to, suicides, sudden deaths, and major assaults;
- (2) a written plan of professional and clinical supervision describing such activities and how they shall be carried out;
- (3) the establishment and implementation of program evaluation activities;
- (4) the strategies for improving client care; and
- (5) evidence of corrective action.

(c) The plan shall be reviewed annually, and may be revised at any time by the Department.

Statutory Authority G.S. 148-19(d).

.1803 QUALITY ASSURANCE COMMITTEE

(a) The Department shall have a quality assurance committee which shall be comprised of:

- (1) representation from mental health and mental retardation service areas;
- (2) a qualified record manager;
- (3) a nurse;
- (4) a psychologist;
- (5) a psychiatrist; and

(6) a social worker.

(b) The purpose, scope and organization of the quality assurance committee shall be specified in the quality assurance plan, which shall include, but need not be limited to the following:

- (1) the committee shall meet at least monthly;
- (2) a member shall not review his own client's treatment or habilitation record; and
- (3) minutes of meetings shall be recorded and shall include, but need not be limited to:
 - (A) date, time, attendees and absentees; and
 - (B) a summary of the business which was conducted.

Statutory Authority G.S. 148-19(d).

.1804 CLIENT CARE EVALUATION STUDIES

The quality assurance committee shall ensure that at least one client care evaluation study of issues, relevant to the improvement of services to clients, is completed during each fiscal year.

Statutory Authority G.S. 148-19(d).

.1805 CLIENT RECORD REVIEW

The quality assurance committee shall establish, implement and document the criteria, procedure and methodology for client record reviews for completeness and adequacy, as delineated in Section .2000 of these Rules.

Statutory Authority G.S. 148-19(d).

.1806 SUPERVISION OF MENTAL HEALTH AND MENTAL RETARDATION STAFF

(a) The Department shall implement a written plan of supervision for staff who are not qualified mental health or mental retardation professionals, as defined in Rule .1403 of Section .1400, and who provide mental health or mental retardation services.

(b) The Department shall ensure that:

- (1) each mental health staff member who provides services, and who is not qualified in that service area, shall have an individual contract of supervision with a qualified mental health professional; and
- (2) each mental retardation staff member

shall be supervised by, or have access to, the professional supervision of a qualified mental retardation professional.

Statutory Authority G.S. 148-19(d).

.1807 PRIVILEGING OF ALL PROFESSIONAL STAFF

(a) The Department shall ensure that the qualifications of each mental health and mental retardation professional are examined, and a determination is made as to treatment or habilitation privileges granted and supervision needed.

(b) Delineation of privileges shall be based on documented verification of the individual's competence, training, experience and licensure.

(c) The privileging process shall be reviewed and approved by the Department's quality assurance committee.

Statutory Authority G.S. 148-19(d).

.1808 EMPLOYEE EDUCATION AND TRAINING

(a) The Department shall:

(1) provide or secure orientation programs and annual continuing education and training for employees to enhance their competencies and knowledge needed to administer, manage, and deliver quality mental health and mental retardation services; and

(2) assure the maintenance of an ongoing record of all education and training activities provided or secured for employees.

(b) The education and training activities shall:

(1) address, at a minimum, the needs identified by the quality assurance process and related committees; and

(2) as deemed necessary by the Department, be provided at no expense to staff.

Statutory Authority G.S. 148-19(d).

.1809 PROGRAM EVALUATION ACTIVITIES

(a) The Department shall implement program evaluation activities.

(b) These activities shall reflect the evaluation of program quality, effectiveness and efficiency in such areas as the:

(1) impact of the program in reducing readmissions;

- (2) availability and accessibility of services;
- (3) impact of services upon the clients within the service area;
- (4) patterns of use of service; and
- (5) cost of the program operation.

Statutory Authority G.S. 148-19(d).

.1810 QUALITY ASSURANCE ANNUAL REPORT

(a) The Department shall make available, to the DHR review team, a written annual report summarizing the activities and recommendations of the quality assurance committee.

(b) This report shall include, at a minimum, the following functional areas:

- (1) client care evaluation studies;
- (2) client record reviews;
- (3) utilization and peer reviews;
- (4) clinical supervision;
- (5) employee education and training activities; and
- (6) the results of program evaluation.

Statutory Authority G.S. 148-19(d).

SECTION .1900 - FACILITIES MANAGEMENT

.1901 SCOPE

The Rules in this Section apply to each service delivery site within the Department and to any other provider of services on a contractual basis.

Statutory Authority G.S. 148-19(d).

.1902 BUILDINGS AND GROUNDS

Buildings and grounds shall be well-maintained in order to promote the health and safety of both clients and staff.

Statutory Authority G.S. 148-19(d).

.1903 SPACE REQUIREMENTS

(a) Space shall be provided to facilitate the delivery of mental health and mental retardation services.

(b) Each client in an inpatient mental health unit shall be housed in a single cell.

(c) Each client in a residential treatment program, who is housed in multiple client rooms, shall have a minimum of 50 square feet of living space.

(d) Each service delivery site shall have private space for interviews and conferences with clients.

Statutory Authority G.S. 148-19(d).

.1904 ADDITIONAL REQUIREMENTS FOR RESIDENTIAL/INPATIENT UNITS

(a) Each residential and inpatient unit providing mental health or mental retardation services shall have indoor space for group activities and gatherings.

(b) The space in which therapeutic and habilitative activities are routinely conducted shall be separate from sleeping areas.

Statutory Authority G.S. 148-19(d).

SECTION .2000 - CLIENT RECORDS

.2001 SCOPE

(a) The Rules in this Section apply to each service delivery site and to any other provider of services on a contractual basis, unless otherwise specified in this Section.

(b) This Section applies to the management of client information which is generated by a service delivery site during the period of time that treatment or habilitation services are rendered to clients.

Statutory Authority G.S. 148-19(d).

.2002 STANDARD CLIENT RECORD

(a) The Department shall develop and maintain a standard client record for each client who receives mental health or mental retardation treatment or habilitation services.

(b) The same forms and filing format shall be utilized within each disability.

Statutory Authority G.S. 148-19(d).

.2003 RECORD REQUIREMENTS

(a) A written client record shall be maintained for each client, and shall contain, at a minimum, the following identifying information:

- (1) name;
- (2) record number;
- (3) date of birth;
- (4) race, sex, and marital status;
- (5) admission date; and
- (6) discharge date.

(b) Active outpatient client records shall be kept in the outpatient health record and filed at the client's assigned unit.

(c) Each inpatient program shall maintain active inpatient records which shall be kept separate from the outpatient records.

(d) The outpatient record shall be transferred to the inpatient unit.

(e) Information required in other Rules in this Subchapter, including but not limited to, prescribing and administering medication, and seclusion and restraint shall be documented in the client record.

(f) All client record entries shall include the date of entry and authentication by the individual making the entry.

(g) The time of service shall be recorded, based upon the nature of the service or incident; such as, shift notes, medication administration, and accidents and injuries.

(h) All client record entries shall be legible and made in permanent ink or typewritten.

(i) Alterations in client records, which are necessary in order to correct recording errors or inaccuracies, shall:

- (1) be made by the individual who recorded the entry;
- (2) have a single, thin line drawn through the error or inaccurate entry with the original entry still legible;
- (3) show the corrected entry legibly recorded above or near the original entry;
- (4) show the type of documentation error or inaccuracy whenever the reason for the alteration is unclear; and
- (5) include the date of correction and initials of recorder.

(j) Each page of the client record shall include the client's name and number.

(k) Client records shall include only those symbols and abbreviations contained in an abbreviation list approved by the Department.

(l) Notations in a client's record shall not identify another client by name.

(m) Each service delivery site shall designate, in writing, those individuals authorized to have access to client records and who may make entries in the record.

(n) Any additional information regarding the following shall be included in the client record:

- (1) diagnostic tests, assessments, evaluation, consultations, referrals, support services or medical services provided;
- (2) known allergies or hypersensitivities;
- (3) major events, accidents or medical emergencies, involving the client;
- (4) consent for, and documentation of, release of information;
- (5) documentation of applied behavior modification, which includes at risk or other intrusive interventions, including

- (6) authorization, duration, summaries of observation and justification;
(7) conferences or involvements with the client's family, significant others, or involved agencies or service providers;
(8) documentation of attendance in outpatient service; and
results of any standardized and non-standardized evaluations, such as social, developmental, medical, psychological, vocational or educational.

Statutory Authority G.S. 148-19(d).

.2004 CONFIDENTIALITY OF CLIENT RECORD

- (a) All information contained in the client record shall be considered privileged and confidential, with the exception of matters of public record, as set forth in 5 NCAC 2D .0600.
(b) The Department shall ensure confidentiality of client records during their use, transportation, and storage.
(c) The Department shall ensure that information contained in client records is released upon the written authorization of the client, in accordance with other Department Rules, or as set forth in the provisions of G.S. 122C-55(c).
(d) Employees governed by the State Personnel Act, G.S. Chapter 126, are subject to suspension, dismissal or disciplinary action for failure to comply with the Rules in this Subchapter.
(e) The Department shall inform all employees, students, volunteers, and all other individuals with access to confidential information, the provisions of the Rules in this Subchapter. Such individuals with access to confidential information shall sign a statement of understanding and compliance.
(f) Records shall be protected against loss, tampering, or use by unauthorized persons.
(g) Records shall be readily accessible to authorized users at all times.
(h) When consent for release of information is obtained, a time-limited consent, not to exceed one year, shall be utilized.

Statutory Authority G.S. 148-19(d).

.2005 DIAGNOSTIC CODING

- The Department shall code diagnoses for clients using the following diagnostic systems:
- (1) Mental illness or mental retardation shall be diagnosed according to the Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition - Revised (DSM-III-R).

- (2) Physical disorders shall be diagnosed according to International Classification of Diseases, 9th Revision, Clinical Modification (ICD-9-CM).

Statutory Authority G.S. 148-19(d).

.2006 CLIENT RECORD AVAILABILITY

The Department shall ensure that client records are available to professional staff for a minimum of three years following the inmate's release. This shall apply to previous incarcerations.

Statutory Authority G.S. 148-19(d).

SECTION .2100 - SERVICE ELIGIBILITY

.2101 SCOPE

The Rules in this Section apply to each service delivery site within the Department and to any other provider of services on a contractual basis.

Statutory Authority G.S. 148-19(d).

.2102 SERVICE CRITERIA

The Department shall ensure the development of service criteria for mental health and mental retardation services. These criteria shall be communicated to inmates and staff.

Statutory Authority G.S. 148-19(d).

.2103 SCREENING

The Department shall develop a systematic means of screening each inmate referred for services to determine his need for services, and designate staff qualified to make screening determinations.

Statutory Authority G.S. 148-19(d).

.2104 WAITING LISTS

The Department shall establish criteria for prioritizing service delivery and use of waiting lists for mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

.2105 INFORMATION REGARDING AVAILABILITY TO SERVICES

The Department shall ensure that each inmate is informed how to access mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

SECTION .2200 - TREATMENT AND HABILITATION

.2201 SCOPE

(a) The Rules in this Section apply to each service delivery site within the Department and to any other provider of services on a contractual basis.

(b) The process of treatment or habilitation shall incorporate activities and procedures that address the client's assets and needs from the point of initial contact, through active treatment or habilitation, and after discharge from treatment.

Statutory Authority G.S. 148-19(d).

.2202 ADMISSION ASSESSMENT

(a) An admission note shall be completed within 24 hours of admission which includes, but need not be limited to:

- (1) reason for admission;
- (2) present condition of the client reported in objective, behavioral terms, and when possible, a description of the client's condition by others;
- (3) diagnostic impression, including a provisional or admitting diagnosis;
- (4) determination of and request for additional referrals or special diagnostic tests, assessments or evaluations, if needed; and
- (5) a preliminary individual treatment or habilitation plan.

(b) If clinically indicated, a social, educational, medical, criminal, vocational, developmental, and psychiatric history shall be completed within 30 days after admission.

Statutory Authority G.S. 148-19(d).

.2203 EVALUATION AND DIAGNOSIS

Each service delivery site shall document, for each client, any routine diagnostic tests, assessments and evaluations, or medical examinations, as well as time frames for their completion.

Statutory Authority G.S. 148-19(d).

.2204 TREATMENT OR HABILITATION PLAN

(a) Each service delivery site shall develop an individualized treatment or habilitation plan for each client based upon:

- (1) an evaluation of his condition, assets and needs; and

(2) information gathered during the admission assessment process.

(b) The treatment or habilitation plan shall be documented in the client record as follows and shall:

- (1) provide a systematic approach to the treatment or habilitation of the client; substantiate the appropriateness of treatment or habilitation goals;
- (2) designate clinical responsibility for the development and implementation of the plan;
- (3) include at least the diagnosis to ensure consistency;
- (4) include time-specific measurable goals; and
- (5) provide a summary of client, and if appropriate, family strengths and weaknesses.

(c) When medically or clinically indicated, the plan shall be:

- (1) revised; and
- (2) reviewed, at least annually, with such review documented in the plan.

(d) The client shall have the opportunity to participate in the development and implementation of the treatment and habilitation plan.

Statutory Authority G.S. 148-19(d).

.2205 PROGRESS NOTES

(a) Progress notes shall be recorded at least on a weekly basis in residential and inpatient services and following each scheduled appointment in outpatient services.

(b) Progress notes shall reflect the client's progress or lack of progress:

- (1) in meeting goals;
- (2) in staff interventions;
- (3) regarding information which may have a significant impact on the client's condition; and
- (4) when indicating reviews of relevant laboratory reports and actions taken.

Statutory Authority G.S. 148-19(d).

.2206 TRANSFER OR DISCHARGE SUMMARY

(a) Whenever a client is transferred to a different level of service, a written transfer note by the referring unit shall accompany the client summarizing the client's condition at the time of transfer, and any recommendations for continued care.

(b) A qualified professional in the receiving unit

shall evaluate the client to determine the need for continued treatment or habilitation.

(c) At the time of discharge, a discharge summary shall be completed and shall include:

- (1) the reason for admission;
- (2) course and progress of the client in relation to the goals and strategies in the individual treatment or habilitation plan;
- (3) condition of the client at discharge;
- (4) recommendations and arrangements for further services or treatment; and
- (5) final diagnosis.

Statutory Authority G.S. 148-19(d).

.2207 TREATMENT AND HABILITATION COORDINATION

(a) Coordination shall be maintained among all staff members contributing to the evaluation, planning, and treatment and habilitation efforts for each client.

(b) Each service delivery site, utilizing shifts or relief staff, shall develop mechanisms to ensure adequate communication among staff regarding clients.

Statutory Authority G.S. 148-19(d).

.2208 RELEASE PLANNING IN RESIDENTIAL AND INPATIENT SERVICES

(a) When release of a client can be anticipated and the need for continued treatment has been identified, each client shall have a written individualized aftercare plan.

(b) The aftercare plan shall:

- (1) be formulated by qualified professionals;
- (2) inform the client of how and where to receive treatment or habilitation services;
- (3) identify continuing treatment or habilitation needs; addressing issues, such as food, housing, and employment;
- (4) indicate the need and the plan, if applicable, to involuntarily commit (inpatient or outpatient);
- (5) involve the respective area program or state facility, when indicated;
- (6) address the procurement and availability of medication prescribed for mental health problems for the released client, regardless of his ability to pay;
- (7) address the use and coordination of

generic resources in the community, which may be through Employment Security Services, Vocational Rehabilitation Services, community colleges, and YMCA; and

(8) be provided to the client.

(c) The Department shall designate a qualified professional staff member to assist the client in establishing contact with the respective area program or state-operated facility.

(d) The designee shall be responsible for providing information to the area program or state-operated facility to ensure continuity of treatment upon the client's release.

Statutory Authority G.S. 148-19(d).

SECTION .2300 - CLINICAL SERVICES

.2301 SCOPE

(a) The Rules in this Section apply to each service delivery site, and to any other provider of services on a contractual basis that incorporates clinical services in their activities.

(b) The provision of clinical services shall be provided by qualified mental health professionals as an essential component of the treatment or habilitation process, to include but not limited to:

- (1) individual and group counseling;
- (2) psychotherapy services;
- (3) testing services; and
- (4) specialized therapies of various kinds.

Statutory Authority G.S. 148-19(d).

.2302 COUNSELING AND PSYCHOTHERAPY SERVICES

Individual, group and family counseling, and psychotherapy shall be provided by, or under the direct supervision of, qualified professionals who have received training in these treatment or habilitation modalities.

Statutory Authority G.S. 148-19(d).

.2303 SPECIALIZED THERAPIES

The following shall be provided by, or under the direct supervision of, staff licensed or registered to perform these activities:

- (1) Medical care;
- (2) physical, occupational, or language and communication therapy; and
- (3) nursing care.

Statutory Authority G.S. 148-19(d).

.2304 TESTING SERVICES

Individuals, who are privileged to utilize the particular testing instrument being administered, shall perform testing in the areas of:

- (1) Psychological;
- (2) developmental;
- (3) educational; and
- (4) intelligence.

Statutory Authority G.S. 148-19(d).

SECTION .2400 - MEDICATION SERVICES

.2401 SCOPE

(a) The Rules in this Section apply to each service delivery site and to any other provider of services on a contractual basis that provide medication services.

(b) Any client who is placed on medication for problems associated with mental health and mental retardation disabilities and needs shall receive, at least, medication services that include, but need not be limited to:

- (1) prescribing;
- (2) dispensing;
- (3) administration;
- (4) storage;
- (5) control; and
- (6) provision of education.

Statutory Authority G.S. 148-19(d).

.2402 DISPENSING OF MEDICATION

(a) Medication shall be dispensed, by a pharmacist or physician, in a properly labeled container in accordance with state and federal law.

(b) The medication container shall protect medication from light and moisture, and shall be in compliance with the Poison Prevention Packaging Act.

Statutory Authority G.S. 148-19(d).

.2403 ADMINISTRATION OF MEDICATION

(a) Medication shall be administered in accordance with state and federal law.

(b) Prescription medication shall be administered in service delivery sites only on the order of an authorized prescriber.

(c) Non-prescription medications and standing orders shall be administered only on the written approval of a physician or person authorized to prescribe legend drugs.

(d) Only properly dispensed medication shall be administered.

(e) Medication shall be administered in inpatient psychiatric services only by a physician, physician assistant, or nurse.

(f) In other service delivery sites, medication may be either:

- (1) administered by program or correctional staff who have received training by the Department; or
- (2) self-administered by any client who has received instructions, from either the program's physician or designee, about:
 - (A) each medication;
 - (B) dosage;
 - (C) time of administration; and
 - (D) side effects and contraindications.

Statutory Authority G.S. 148-19(d).

.2404 INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION

(a) Psychotropic medication may be administered to any non-consenting client who is mentally ill and receiving inpatient mental health treatment, when any one or more of the following conditions exist:

- (1) failure to treat the client's illness or injury would pose an imminent substantial threat of injury or death to the client or those around him; or if
- (2) there is evidence that the client's condition is worsening, and if not treated, is likely to produce acute exacerbation of a chronic condition that would endanger the safety or life of the client or others; and:
 - (A) the evidence of substantial and prolonged deterioration is corroborated by medical history; and
 - (B) the source of the history is documented in the client's record.

(b) A medication refusal exists when a client refuses to take medication within 30 minutes of the initial offer. Any client who accepts medication within 30 minutes of the initial offer shall not be considered to have refused medication.

(c) Medication Refusal:

- (1) All incidents of medication refusal shall be:
 - (A) reported as promptly as possible to the psychiatrist who is treating the client; and
 - (B) documented on progress notes and the medication chart by staff responsible for administering the medication.
- (2) The administering staff shall attempt to

determine the reason for refusal by questioning the client and encouraging him to accept the medication. Such shall be documented in the client's record.

- (3) Any member of the treatment team shall discuss the reasons for refusal directly with the client and attempt to resolve those concerns which are the source of the refusal before a forced medication order is written.

(d) Initial Emergency Situation:

- (1) In an initial emergency situation the physician:
- (A) may initiate procedures and write an order for administering emergency forced medication, not to exceed 72 hours; and
- (B) shall document in the client's record the pertinent circumstances and rationale for the psychotropic medication.
- (2) If the physician determines that the condition set forth in Paragraph (a)(1) of this Rule exists and:
- (A) the medication is a generally accepted treatment for the client's condition;
- (B) there is a substantial likelihood that the treatment will effectively reduce the signs and symptoms of the client's illness; and
- (C) from a therapeutic viewpoint, the proposed medication is the least intrusive of the possible treatments.

In all cases, the medication shall not exceed the dosage expected to accomplish the treatment objective.

- (3) Continuation of emergency situation:
- (A) If needed, two subsequent emergency periods of 72 hours may be authorized only after the attending psychiatrist has received the written or verbal concurrence from another psychiatrist not currently involved in the client's treatment.
- (B) Then, if the client continues to refuse medication after it is determined that psychotropic medication is still warranted, procedures for administering medication in a non-emergency situation shall be implemented.

(e) Non-Emergency Situations:

- (1) When a client refuses psychotropic medication in a non-emergency situation, the attending physician shall:
- (A) make every effort to determine the

cause of the refusal;

- (B) inform the client of indications for psychotropic medication (benefits and risks), and the advantages and disadvantages of any alternate courses of treatment; and
- (C) request his consent.

- (2) The treatment team may also assist in efforts to explain the advantages of medication to the client.
- (3) The client's record shall contain documentation that efforts have been made to determine the cause of refusal and advantages of medication.

- (4) The physician shall initiate a referral to the Involuntary Medication Committee if the client continues to refuse medication. The Committee shall:
- (A) determine whether the condition as set forth in Paragraph (a) exists before authorizing an involuntary medication order;
- (B) apply the criteria set forth in Subparagraphs (d)(1) and (2) in making its determination.
- (C) If neither of the conditions set forth in Paragraph (a) of this Rule exists, the client's refusal to accept the medication will be honored.

(f) Involuntary Medication Committee:

- (1) The Involuntary Medication Committee shall be appointed by the Chief of Mental Health Services and consist of a psychiatrist, a psychologist, and a mental health nurse who is a Registered Nurse.
- (A) If the psychiatrist who issued the involuntary medication order is the individual who normally sits on the committee, another psychiatrist shall serve in that capacity.
- (B) Other prison staff, who have pertinent information that may be useful to the committee in making its determination, shall be required by the committee to attend the hearing.
- (2) In conducting the hearing, the committee chairman, appointed by the Chief of Mental Health Services, shall ensure that the client:
- (A) has received written and verbal notice of the time, date, place, and the purpose of the hearing;
- (B) is informed of his right to hear evidence providing the basis for the

- involuntary medication, and the right to call witnesses in his behalf;
- (C) attends the hearing, unless his clinical condition is such that his attendance is not feasible. In this case, the Committee shall:
- (i) state the reasons for determining that the presence of the client is not feasible.
 - (ii) allow the client to be interviewed in his room by the client representative and one or more members of the Committee, if appropriate; and
 - (iii) allow the client representative an opportunity to present facts relevant to whether an involuntary medication order should be issued.
- (D) shall be allowed a reasonable number of witnesses, to be determined by the committee chairman, or:
- (i) written statements may be considered in lieu of direct testimony; and
 - (ii) specific client witnesses may be excluded from direct testimony if the unit superintendent, or designee, determines a justifiable security risk would occur if they were brought to the hearing site.
- (E) be given the opportunity to question any staff who present evidence that supports the need to involuntarily medicate.
- (3) After the committee has received all relevant information, the committee shall:
- (A) consider the facts and arrive at a majority decision;
 - (B) ensure that the authorization to involuntarily medicate shall not exceed 30 days.
 - (C) prepare and file in the client's record a written summary of the evidence presented and the rationale for the decision; and
 - (D) consult an attorney from the Attorney General's Office, assigned to represent the Department, at any time questions concerning the legal propriety of forcibly administering medication in a given case.
- (4) If, after the initial 30 day period, involuntary medication is still deemed neces-
- sary, the psychiatrist may again present the case to the Involuntary Medication Committee which:
- (A) shall conduct a review of the record and the reasons presented in support of continuing involuntary medication; and
 - (B) may then authorize the administration of involuntary medication for 90 additional days. Subsequent 90-day periods may be authorized after similar reviews.
- (g) Client Representative:
- (1) Whenever a client is recommended for forced medication on a non-emergency basis, the Mental Health Program Director, or his designee, shall appoint a member of the treatment staff to serve as a Client Representative, whose role shall include:
 - (A) assisting the client in verbalizing the reasons for his refusal of psychotropic medications in meetings with his treatment team;
 - (B) providing this information to the Involuntary Medication Committee; and
 - (C) preparing a summary of the reasons for the refusal and documenting it in the client's record.
 - (2) The Client Representative shall appear before the Involuntary Medication Committee whenever he feels that it is in the best interest of the client, or at the client's request.
 - (3) When reviewing any case involving the involuntary administration of medication, the Involuntary Medication Committee shall consider oral or written comments from the Client Representative.
- (h) Whenever physical force is actually employed, complete documentation of all actions relating to the forceful administration of medication shall be included in the client's record and reported to the Unit Superintendent on a "Use of Force Report" (DC-422).

Statutory Authority G.S. 148-19(d).

.2405 PSYCHOTROPIC MEDICATION EDUCATION

- (a) To ensure the client's understanding of psychotropic medication, individual or group medication education shall be provided to each

client:

- (1) who is to begin receiving, or is to be maintained on, psychotropic medication; and
- (2) by the prescribing physician, or other person approved by the physician;
- (b) Documentation in the client record shall reflect that medication education has been provided.

Statutory Authority G.S. 148-19(d).

SECTION .2500 - PROTECTIONS REGARDING CERTAIN PROCEDURES

.2501 SCOPE

The Rules in this Section specify protections regarding the use of certain specified procedures, in order to promote dignity and humane care for any client receiving mental health and mental retardation services.

Statutory Authority G.S. 148-19(d).

.2502 USE OF SECLUSION

(a) Seclusion shall be used only under one of the following conditions:

- (1) on an emergency basis when it is believed necessary to prevent immediate harm to the client or to others; or
- (2) on a non-emergency basis when it is believed that seclusion will resolve the presenting situation, or will produce the desired behavioral change.

(b) Emergency seclusion shall last no longer than is necessary to control the client.

(c) Seclusion shall not exceed seven days without the review and approval of an internal committee in accordance with Paragraph (e) of this Rule.

(d) Observations, or reviews, of any client in seclusion shall be made as follows:

- (1) Any client placed in seclusion will be observed no less than 30 minutes;
- (2) A clinician may extend this interval up to 60 minutes if, in his clinical opinion, such an observation would not affect the health, safety or welfare of the client;
- (3) Documentation for extending the observation shall be placed in the client's record;
- (4) Observations by a clinician shall be made at least daily, or when the clinician is not present at the facility, observations by a health professional shall be

reported by telephone to a clinician; and

- (5) Reviews by an internal committee shall be made in accordance with Paragraph (e) of this Rule.

(e) Committee review:

- (1) If it appears that seclusion may be indicated for a period to exceed seven days:

(A) an internal committee consisting of a clinician, a nurse or member of the medical staff, and a member of the administrative staff shall review the use of seclusion and interview the client; and

(B) continued use shall not exceed the initial seven days without the approval of this committee.

- (2) Following its initial review, the committee shall review the case at intervals not to exceed 30 days.

(f) When a client is placed in seclusion, his client record shall contain the following documentation:

- (1) the rationale and authorization for the use of seclusion, including placement in seclusion pending review by the responsible clinician;
- (2) a record of the observation of the client as required in Subparagraph (d)(1) of this Rule;
- (3) each review by the responsible clinician as required in Subparagraph (d)(2) of this Rule, including a description of the client's behavior and any significant changes which may have occurred; and
- (4) each review by the internal committee as required in Paragraph (e) of this Rule.

Statutory Authority G.S. 148-19(d).

.2503 USE OF RESTRAINT

(a) Restraint shall be used only under the following circumstances:

- (1) after less restrictive measures, such as counseling and seclusion have been attempted, or when clinically determined to be inappropriate or inadequate to avoid injury to self or others; and
- (2) either:

(A) upon the order of a clinician to control a client who has attempted, threatened, or accomplished harm to himself or others; or

- (B) upon the authorization of the officer-in-charge on an emergency basis when believed necessary to prevent immediate harm to the client or to others.
- (3) When determining if restraint is indicated, a clinician shall consider whether the client:
- (A) has inflicted an injury to himself or to others and, if so, the nature and extent of such injury; or
- (B) through words or gestures, threatens to inflict further injury, and the manner and substance of the threat.
- (b) When a client exhibits behavior indicating the use of restraints and under the conditions of Paragraph (a) of this Rule, the following procedures shall be followed:
- (1) If, in the judgment of any staff member, immediate restraint is necessary to protect the client or others, the client shall be referred immediately to a clinician for observation and treatment.
- (2) If there is insufficient time to make the referral, or if a clinician is not immediately available:
- (A) the staff in charge may employ emergency use of restraint;
- (B) within four hours of the initial restraint, the client shall be reviewed and a restraint order by a clinician. This may be accomplished by:
- (i) telephone contact between the senior health professional at the facility and the clinician; and
- (ii) if such review cannot be obtained, the client shall be released from restraint.
- (C) a restraint order shall not exceed four hours. At the expiration of the restraint order, the client shall be released from restraint unless a new order is issued; and
- (D) any subsequent order for continuing restraint shall be based on:
- (i) the client's present condition and behavior; and
- (ii) reasons other than the original reasons for restraint, or specifically indicate why the original reasons are considered applicable at the time of the subsequent order.
- (c) Whenever the client is restrained and subject to injury by another client, a professional staff member shall remain continuously present with the client. Observations and interventions shall be documented in the client record.
- (d) All orders for continuation of restraint shall be reviewed and documented in intervals not to exceed four hours thereafter, either by personal examination or telephone communication between health professionals and the responsible clinician.
- (e) All orders of restraint issued or approved by a clinician shall include written authorization to correctional staff or health professionals to release the client when he is no longer dangerous to himself or to others.
- (f) The responsible clinician shall be notified upon release of a client from restraint.
- (g) Observations or reviews of all clients in restraint shall be made as follows:
- (1) observations at least every 30 minutes;
- (2) observations every four hours by the responsible clinician either personally or through reports from health professionals; and
- (3) reviews by an internal committee in accordance with Paragraph (h) of this Rule.
- (h) Committee review: An internal committee consisting of three members of the Department's clinical and administrative staff, including at least one psychologist and one psychiatrist shall review cases in which restraints were used beyond four hours. The incident will be reviewed and include consideration of the following:
- (1) the use of appropriate procedures in the decision to restrain;
- (2) sufficient indications for the use of restraint; and
- (3) release of the client from restraint at the appropriate time.
- (i) When a client is placed in restraint, the client record shall contain documentation of the following:
- (1) the rationale and authorization for the use of restraint including placement in restraint pending review by the responsible clinician;
- (2) a record of the observations of the client as required in Paragraph (h) of this Rule;
- (3) each review by the responsible clinician as required by this Rule including a description of the client and any significant changes which may have occurred; and
- (4) each review by the internal committee as required in Paragraph (i) of this Rule.

Statutory Authority G. S. 148-19(d).

.2504 PROTECTIVE DEVICES

Whenever protective devices are utilized for any client, the Mental Health Program Director shall:

- (1) ensure that the:
 - (a) necessity for the protective device has been assessed and approved by a mental health professional;
 - (b) device shall be applied by a person who has been trained in the utilization of protective devices;
 - (c) client, using protective devices which limits his freedom of movement, is observed every two hours; and
 - (d) client is given the opportunity for toileting and exercising.
- (2) document the utilization of protective devices in the client's medical record.

Statutory Authority G.S. 148-19(d).

.2505 VOLUNTARY REFERRALS AND TRANSFERS

(a) Non-emergency referrals shall be forwarded to the mental health or mental retardation professional designated to receive such referrals at the service delivery site to which the client is assigned.

(b) If the mental health or mental retardation professional determines that the client is in need of services provided at a residential or inpatient unit, the client shall be given:

- (1) written notice of the reasons for the referral;
- (2) the expected benefits of the treatment to be received; and
- (3) his rights as described in Rule .2507 of this Subchapter.

(c) If the client agrees to a voluntary transfer to the specified residential or inpatient unit, he will be asked to give written consent, with witness by a member of the staff.

(d) If the client refuses to sign the form, yet verbally agrees, this fact must be documented by two witnesses prior to initiating the transfer to the mental health unit.

(e) The referring mental health or mental retardation professional shall complete the necessary referral forms and arrange for the client's transfer.

Statutory Authority G.S. 148-19(d).

.2506 INVOLUNTARY REFERRALS AND TRANSFERS

(a) Referrals and transfers to residential or inpatient units on an involuntary basis shall occur only when the attending clinician determines that:

- (1) a client requires treatment services not available at his current service delivery site; and
- (2) a transfer over his objections is required.

(b) Non-emergency involuntary referrals:

- (1) If, in the judgment of a qualified professional, the following conditions exist:
 - (A) a diagnosable mental disorder; and
 - (B) determination is made that outpatient services are not effective treatment for the client.

(2) Then, the professional shall give the client a written notice of referral for transfer, and explain to the client his rights in accordance with Rule .2507 of this Section.

(3) If the client does not voluntary consent to the referral and transfer, the following steps shall be taken:

- (A) the client shall be provided with the time, date and place of a hearing;
- (B) the Mental Health Program Director, or his designee, shall contact the hearing officer to arrange a hearing; and
- (C) a client advisor shall be appointed and a hearing conducted in accordance with the procedures specified in this Rule.

(c) Emergency involuntary referrals:

(1) Such referrals shall be implemented only:

- (A) when a client has a diagnosable mental disorder; and
- (B) either:

- (i) presents a substantial risk of harm to himself or others, as manifested by recent overt acts or expressed threats of violence; or
- (ii) is so unable to care for his own personal health and safety as to create a substantial risk of harm to himself; and

(C) determination is made that outpatient services are not effective treatment for the client's condition.

(2) Such referrals shall be made by the mental health staff, the unit physician, nurse, or officer in charge after consultation with the designated mental health

- (3) staff of the receiving unit.
 The officer in charge shall authorize a transfer only under the following conditions, and when, in his opinion:
- (A) the emergency referral criteria has been met; and
 - (B) reasonable efforts have been made to contact the referring mental health professional and have failed.
- (d) A client who is transferred because he meets the criteria of an emergency will be afforded a hearing at the receiving unit within ten days of admission. This hearing will follow the same procedures as those outlined in this Rule.
- (e) Inmate advisors:
- (1) Each client referred for a hearing shall have an advisor appointed to assist him in preparing for the hearing.
 - (2) Each area administrator or institution head shall be responsible for appointing advisors for all units within his jurisdiction.
 - (3) Inmate advisors shall be free to advise the inmate, independently, and to act solely in his behalf; and shall not be subject to any harassment, discipline, or pressure in connection with such advice for the inmate.
 - (4) Ex parte attempts to influence the decision of the hearing officer shall be prohibited.
- (f) Hearing officers: The Chief of Mental Health Services shall recommend, and the Director of the Division of Prisons shall appoint sufficient numbers of persons to serve as hearing officers who shall:
- (1) be qualified professionals, neutral and independent;
 - (2) have the authority to refuse to transfer an inmate when, in their judgment, such a transfer is not justified.
 - (3) ensure and document that an inmate advisor has been assigned;
 - (4) conduct a hearing that follows the procedures as specified in this Rule in a fair and impartial manner; and
 - (5) determine from evidence presented whether the criteria for emergency or non-emergency referrals has been met.
- (g) Hearing procedures:
- (1) The hearing shall be conducted no sooner than 48 hours from the time the inmate is given written notice that he is being considered for a referral to a residential or inpatient unit; however,
- the inmate has the right to waive the 48-hour notice.
- (2) The hearing officer shall determine the time, place and site of the hearing, after considering the relevant factors.
- (3) The hearing officer shall consider all relevant and non-repetitive evidence, justifying or disputing the involuntary transfer and that:
- (A) the inmate has a diagnosable mental disorder;
 - (B) the inmate requires services that are not currently available on an outpatient basis; and
 - (C) the unit to which the inmate is to be transferred is better able to provide the needed treatment/habilitation services than is the currently assigned housing unit.
- (4) A copy of the referral form, as well as other relevant written documents, shall be entered as evidence.
- (5) All written documents or verbal information are to be considered confidential, in accordance with Department policy.
- (6) The inmate shall not have direct access to his client record; however, the inmate advisor may:
- (A) review the client's record presented at the hearing; and
 - (B) consult with the inmate about its use at the hearing and any other matters which could be relevant at the hearing, including the questioning of all witnesses.
- (7) The inmate who is being considered for transfer, or his advisor, may question any witnesses for the State, including mental health or mental retardation professionals.
- (8) The inmate may also present witnesses in his own behalf with limitations which include that:
- (A) a reasonable number of witnesses will be allowed at the discretion of the Hearing Officer;
 - (B) testimony may be received by conference telephone call if the hearing is conducted away from the inmate's assigned unit;
 - (C) written statements may be entered in lieu of direct testimony; and
 - (D) specific inmate witnesses may be excluded from direct testimony if a

- justifiable security risk, as determined by a unit superintendent, or designee, would occur were they brought to the hearing site.
- (9) The hearing officer shall:
- (A) document the results of the hearing, summarizing the evidence presented and the rationale for his decision;
 - (B) communicate the results of the hearing to the inmate and staff; and
 - (C) ensure that a copy of relevant documents are placed in the client record.
- (10) The decision to transfer involuntarily is valid throughout the duration of the stay at any residential or inpatient unit, with required 30-day reviews of the need for continued treatment or habilitation.
- (11) An inmate may be transferred to another like unit without a rehearing; however, if he is discharged from residential or inpatient services, a rehearing is required prior to readmission to that level of service.
- (12) At the request of the inmate, his case shall be reviewed by a Hearing Officer within 90 days after the initial hearing, to determine whether the assignment to the residential or inpatient unit shall be extended or terminated. Subsequent reviews thereafter shall take place each 180 days if requested by the inmate.

Statutory Authority G.S. 148-19(d).

.2507 TRANSFER TO RESIDENTIAL OR INPATIENT UNITS

All inmates who are considered for transfer to a residential or inpatient unit shall have rights which include, but need not be limited to:

- (1) written notice that transfer to a residential or inpatient mental health facility is being considered, including a statement of the reasons for the referral or transfer;
- (2) a hearing, sufficiently after notice is given, to prepare objections, if any;
- (3) opportunity to:
 - (a) testify in person;
 - (b) present documented evidence; and
 - (c) present and question witnesses called by the State, except upon a finding not arbitrarily made, of good cause, for not permitting such presentation, confrontation, or cross-examination;

- (4) a neutral and independent decision-maker who has the authority to refuse admission;
- (5) a written statement by the decision-maker as to reasons for his decision to refer and transfer, with which two psychiatrists or psychologists concur;
- (6) qualified and independent assistance from an advisor, not necessarily an attorney, to assist the inmate in preparing his objections;
- (7) periodic review of the continuing need for treatment; and
- (8) effective and timely notice of all of the above rights.

Statutory Authority G.S. 148-19(d).

SECTION .2600 - RESEARCH PRACTICES

.2601 SCOPE

- (a) The Rules in this Section apply to research activity or treatment involving direct contact with a client.
- (b) An activity or treatment procedure shall be considered research when it:
 - (1) involves a clinical practice that is not conventional; or
 - (2) is a type of procedure that serves the purpose of research only, and does not include treatment designed primarily to benefit the client.

Statutory Authority G.S. 148-19(d).

.2602 RESEARCH REVIEW BOARD

- (a) Research that involves a client shall be reviewed and approved by a research review board established by the Department.
- (b) The research review board shall approve, require modification, or disapprove proposed research projects subject to the approval of the Department.
- (c) Individuals who are not directly associated with research projects under consideration shall comprise a majority of the review board.
- (d) Each proposed research project shall be presented to a research review board as a written protocol containing the following information:
 - (1) identification of the project and the investigator;
 - (2) abstract, containing a short description of the project;
 - (3) statement of objectives and rationale; and

- (4) description of methodology, including informed consent if necessary.
- (e) Prior to the initiation of each research project, a research review board shall:
 - (1) conduct an initial review of the project;
 - (2) state the frequency with which it will review the project after it has been initiated; and
 - (3) hold a review prior to any major changes being made in research procedures.
- (f) Written minutes of each research board's meeting shall be maintained and contain documentation that:
 - (1) risks to the client were minimal and reasonable for the benefits to be accrued;
 - (2) client participation was voluntary;
 - (3) unnecessary intrusion on the client was eliminated;
 - (4) informed consent was obtained; and
 - (5) compliance with confidentiality requirements as contained in .2004 of these Rules.

Statutory Authority G.S. 148-19(d).

.2603 CONDITIONS OF CLIENT PARTICIPATION

- (a) Informed written consent shall be obtained from each client in a research project as follows:
 - (1) documentation that the client has been informed of any potential dangers that may exist, and that he understands the conditions of participation; and
 - (2) notice of the client's right to terminate participation at any time without prejudicing the treatment he is receiving.
- (b) A copy of the dated, signed consent form shall be kept on file.

Statutory Authority G.S. 148-19(d).

SECTION .2700 - EMERGENCY SERVICES

.2701 SCOPE

- (a) The Department shall ensure that emergency mental health and mental retardation services are available to all inmates.
- (b) Emergency services provide:
 - (1) immediate assessment and intervention;
 - (2) referral for continuing care after emergency treatment, for inmates experiencing acute emotional or behavioral problems.
- (c) Emergency services consist of a variety of

- services which may include, but need not be limited to:
- (1) crisis intervention;
 - (2) telephone crisis services; and
 - (3) medical and psychiatric back-up.

Statutory Authority G.S. 148-19(d).

.2702 TRAINING OF STAFF

The Department shall ensure that staff who:

- (1) supervise inmates have been trained to access and refer to emergency services; and
- (2) provide emergency services are properly trained.

Statutory Authority G.S. 148-19(d).

SECTION .2800 - PREVENTION SERVICES

.2801 SCOPE

The Department shall develop a process to identify inmates who are:

- (1) at risk for developing mental disorders; and
- (2) provide counseling, education, instruction and protective living arrangements to enhance their ability to cope in the prison environment.

Statutory Authority G.S. 148-19(d).

SECTION .2900 - INPATIENT SERVICES FOR INMATES WHO ARE MENTALLY ILL

.2901 SCOPE

- (a) Inpatient units for clients who are mentally ill shall provide close supervision by a qualified mental health professional on a 24-hour basis.
- (b) The inpatient unit shall be designed to serve any client who requires continuous treatment for moderate or severe mental illness.
- (c) Client care shall be provided under the supervision of a psychiatrist or doctoral level psychologist.
- (d) Individuals who, in addition to mental illness, have other disorders such as mental retardation or substance abuse, shall be eligible for admission.

Statutory Authority G.S. 148-19(d).

.2902 HOURS OF OPERATION

The inpatient unit shall provide services seven

days per week, 12 months per year.

Statutory Authority G.S. 148-19(d).

.2903 REQUIRED SERVICES

(a) Services provided on an inpatient unit shall include, but need not be limited to:

- (1) psychiatry;
- (2) psychology;
- (3) nursing;
- (4) social work;
- (5) rehabilitation; and
- (6) recreational.

(b) Multi-disciplinary treatment teams shall be developed to oversee the delivery of such services.

Statutory Authority G.S. 148-19(d).

SUBCHAPTER 14J -TREATMENT OR HABILITATION RIGHTS

SECTION .0200 - PROTECTIONS REGARDING CERTAIN PROCEDURES

.0201 PROHIBITED PROCEDURES

(a) Each state facility shall develop policies relative to prohibited interventions. Such policies shall specify:

- (1) those interventions which have been prohibited by statute or rule which shall include:
 - (A) any intervention which would be considered corporal punishment under G.S. 122C-59;
 - (B) the contingent use of painful body contact;
 - (C) substances administered to induce painful bodily reactions exclusive of Antabuse;
 - (D) electric shock (excluding medically administered electroconvulsive therapy);
 - (E) insulin shock; and
 - (F) psychosurgery.
- (2) those interventions specified in this Subchapter determined by the State Facility Director to be unacceptable for use in the state facility. Such policies shall specify interventions prohibited by funding sources including the use of seclusion or the emergency use of isolation time out in an ICF/MR facility.

(b) In addition to the procedures prohibited in Paragraph (a) of this Rule, the State Facility

Director shall specify other procedures which shall be prohibited.

Statutory Authority G.S. 122C-51; 122C-57; 122C-59; 131E-67; 143B-147.

.0203 GENERAL POLICIES REGARDING INTERVENTIVE PROCEDURES

(a) This Rule governs the policies and requirements regarding the use of the following interventions:

- (1) seclusion;
- (2) restraint; mechanical restraints (other than protective devices as covered in Rule .0207 of this Section) including:
 - (A) mechanical restraint to a bed, chair or other nonmoveable object, or
 - (B) ambulatory restraints;
- (3) isolation time out;
- (4) exclusionary time out for more than 15 minutes;
- (5) time out for more than one hour;
- (6) contingent withdrawal or delay of access to personal possessions or goods to which the client would ordinarily be entitled;
- (7) consistent deprivation of items or cessation of an activity which the client is scheduled to receive (other than basic necessities); and
- (8) overcorrection which the client resists.

(b) The State Facility Director shall develop policies and procedures for those interventions determined to be acceptable for use in the state facility. Such policies shall include:

- (1) procedures for ensuring that the competent adult client or legally responsible person of a minor client or incompetent adult client is informed:
 - (A) of the general types of intrusive interventions that are authorized for use by the state facility; and
 - (B) that the legally responsible person can request notification of each use of an intervention as specified in this Rule, in addition to those situations required by G.S. 122C-62;
- (2) provisions for humane, secure and safe conditions in areas used for the intervention, such as adequate ventilation, light, and a room temperature consistent with the rest of the state facility;
- (3) appropriate attention paid to the need for fluid intake and the provision of regular meals, bathing, and the use of

- the toilet. Such attention shall be documented in the client record; and
- (4) procedures for assuring that when an intervention as specified in this Rule has been used with a client three or more times within a 30 day period in a calendar month, the following requirements are met:
- (A) A treatment/habilitation plan shall be developed within ten working days of the third intervention. The treatment/habilitation plan shall include, but not be limited to:
- (i) indication of need;
 - (ii) specific description of problem behavior;
 - (iii) specific goals to be achieved and estimated duration of procedures;
 - (iv) specific early interventions to prevent tension from escalating to the point of loss of control whenever possible;
 - (v) consideration, whenever possible, for client's preference for the type of restraint to be used;
 - (vi) specific procedure(s) to be employed;
 - (vii) specific methodology of the intervention;
 - (viii) methods for measuring treatment efficacy;
 - (ix) guidelines for discontinuation of the procedure;
 - (x) the accompanying positive treatment or habilitation methods which shall be at least as strong as the negative aspects of the plan; and
 - (xi) specific limitations on approved uses of the intervention per episode, per day and requirements for on-site assessments by the responsible professional.
 - (xii) description of any requirements in Rule .0206 of this Section to be incorporated into the plan.
- (B) In emergency situations, with the approval of the State Facility Director, the treatment/habilitation team may continue to use the intervention until the planned intervention is addressed in the treatment/habilitation plan.
- (C) The treatment/habilitation team shall explain the intervention and the rea-
- son for the intervention to the client and the legally responsible person, if applicable, and document such explanation in the client record.
- (D) Before implementation of the planned intervention, the treatment/habilitation team shall approve the treatment-/habilitation plan and consent shall be obtained as specified in Rule .0210(d) in this Section.
- (E) The use of the intervention shall be reviewed at least monthly by the treatment/habilitation team and at least quarterly, if still in effect, by a designee of the State Facility Director. The designee of the State Facility Director may not be a member of the client's treatment/habilitation team. Reviews shall be documented in the client record.
- (F) Treatment/habilitation plans which include these interventions shall be subject to review by the Human Rights Committee in compliance with confidentiality rules as specified in 10 NCAC 14G.
- (G) Each treatment/habilitation team shall maintain a record of the use of the intervention. Such records or reports shall be available to the Human Rights Committee and internal client advocate within the constraints of 10 NCAC 18D .0215 and G.S. 122C-53(g).
- (H) The State Facility Director shall follow the Right to Refuse Treatment Procedures as specified in Section .0300 of this Subchapter.
- (I) The interventions specified in this Rule shall never be the sole treatment modality designed to eliminate the target behavior. The interventions are to be used consistently and shall always be accompanied by positive treatment or habilitation methods.
- (c) Whenever the interventions as specified in this Subchapter result in the restriction of a right specified in G.S. 122C-62(b) and (d), procedures specified in G.S. 122C-62(e) shall be followed. Exception to this Rule includes the use of seclusion, restraint and isolation time out, which is regulated in Rule .02046 of this Section.
- (d) The State Facility Director shall assure by documentation in the personnel records that state facility employees who authorize interventions

shall be privileged to do so, and state facility employees who implement interventions shall be appropriately trained in the area of such interventions, as well as alternative approaches.

(e) The State Facility Director shall maintain a statistical record that reflects the frequency and duration of the individual uses of interventions specified in this Rule. This statistical record shall be made available to the Human Rights Committee and the Division at least quarterly.

Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 122C-62; 131E-67; 143B-147.

.0204 INDICATIONS FOR USE OF SECLUSION AND ISOLATION TIME OUT

(a) This Rule delineates the procedures to be followed for seclusion, restraint and isolation time out in addition to the procedures specified in Rule .0203 of this Section.

(b) This Rule governs the use of physical or behavioral interventions which are used to terminate a behavior or action in which a client is in imminent danger of abuse or injury to self or other persons or when substantial property damage is occurring, or which are used as a measure of therapeutic treatment. Such interventions include:

- (1) seclusion;
- (2) restraint; and
- (3) isolation time out.

(c) The use of seclusion, restraint and isolation time out shall be limited to those situations specified in G.S. 122C-60, which include:

- (1) emergency interventions (planned and unplanned); and
- (2) therapeutic treatment as specified in Rule .0206 of this Section.

(d) If determined to be acceptable for use within the state facility, the State Facility Director shall establish written policies and procedures that govern the use of seclusion, restraint and isolation time out which shall include the following:

- (1) process for identifying and privileging state facility employees who are authorized to use such interventions;
- (2) provisions that a qualified or responsible professional shall:
 - (A) review the use of the intervention as soon as possible but at least within one hour of the initiation of its use;
 - (B) verify the inadequacy of less restrictive intervention techniques; and
 - (C) document in the client record evidence of approval or disapproval of

continued use.

(3) procedures for documenting the intervention which occurred to include, but not be limited to:

- (A) the rationale for the use of the intervention which also addresses the inadequacy of less restrictive intervention techniques;
- (B) notation of the frequency, intensity, and duration of the behavior and any precipitating circumstances contributing to the onset of the behavior;
- (C) description of the intervention and the date, time and duration of its use;
- (D) estimated amount of additional time needed in seclusion, restraint or isolation time out; and
- (E) signature and title of the state facility employee responsible for the use of the intervention.

(4) procedures for the notification of others to include:

- (A) those to be notified as soon as possible but no more than 72 hours after the behavior has been controlled to include:
 - (i) the treatment/habilitation team, or its designee, after each use of the intervention;
 - (ii) a designee of the State Facility Director; and
 - (iii) the internal client advocate, in accordance with the provisions of G.S. 122C-53(g); and

(B) notification in a timely fashion of the legally responsible person of a minor client or an incompetent adult client when such notification has been requested.

(e) Seclusion, restraint and isolation time out shall not be employed as punishment or for the convenience of staff or used in a manner that causes harm or undue physical or mental discomfort or pain to the client.

(f) Whenever a client is in seclusion, restraint or isolation time out for more than 24 continuous hours, the client's rights, as specified in G.S. 122C-62, are restricted. The documentation requirements in this Rule shall satisfy the requirements specified in G.S. 122C-62(e) for restriction of rights.

(g) Whenever seclusion, restraint or isolation time out is used more than three times in a calendar month, a pattern of behavior has developed and future emergencies can be reasonably predict-

ed. Therefore, the dangerous behavior can no longer be considered unanticipated, and emergency procedures shall be addressed as a planned intervention in the treatment/habilitation plan.

(h) In addition to the requirements in this Rule, additional safeguards as specified in Rule .0206 of this Section shall be initiated under the following conditions:

- (1) whenever a client exceeds spending 40 hours, or more than one episode of 24 or more continuous hours of his time in emergency seclusion, restraint or isolation time out during a calendar month; or
- (2) whenever seclusion, restraint or isolation time out is used as a measure of therapeutic treatment as specified in G.S. 122C-60 and is limited to specific planned behavioral interventions designed for the extinction of dangerous, aggressive or undesirable behaviors.

(i) The written approval of the State Facility Director or his designee shall be required when seclusion, restraint or isolation time out is utilized for longer than 24 continuous hours.

(j) Standing orders or PRN orders shall not be used to authorize the use of seclusion, restraint or isolation time out.

(k) The client shall be removed from seclusion, restraint or isolation time out when he no longer demonstrates the behavior which precipitated the seclusion, restraint or isolation time out. In no case shall the client remain in seclusion, restraint or isolation time out longer than an hour after gaining behavioral control unless the client is asleep during regularly scheduled sleeping hours. If the client is unable to gain self control within the time frame specified in the authorization, a new authorization must be obtained.

(l) Whenever seclusion, restraint or isolation time out is used on an emergency basis prior to inclusion in the treatment/habilitation plan, the following procedures shall be followed:

- (1) A state facility employee authorized to administer emergency interventions may employ such procedures for up to 15 minutes without further authorization.
- (2) A qualified professional who has experience and training in the use of seclusion, restraint or isolation time out and who has been privileged to employ such interventions may authorize the continued use of such interventions for up to one hour from the time of initial employment of the intervention. If a

qualified professional is not immediately available to conduct an assessment of the client, but after discussion with the state facility employee, conveys that the intervention is justified for longer than 15 minutes, he shall verbally authorize the continuation of the intervention for up to one hour. The qualified professional shall observe and assess the client within one hour after authorizing the continued use of the intervention. If the intervention needs to be continued for longer than one hour, the professional responsible for the client's treatment/habilitation plan shall be consulted.

(3) The responsible professional shall authorize the continued use of seclusion, restraint or isolation time out for periods over one hour. If the responsible professional is not immediately available to conduct a clinical assessment of the client, but after discussion with the qualified professional, conveys that the intervention is justified for longer than one hour, he may verbally authorize the continuation of the intervention until an onsite assessment of the client can be made. The responsible professional shall meet with and conduct an assessment of the client and write such authorization within 12 hours from the time of initial employment of the intervention.

(m) While the client is in seclusion, restraint or isolation time out, the following precautions shall be followed:

- (1) Whenever a client is in seclusion or restraint, periodic observation of the client shall occur at least every 15 minutes, or more often as necessary, to assure the safety of the client. Appropriate attention shall be paid to the provision of regular meals, bathing and the use of the toilet. Such observation and attention shall be documented in the client record.
- (2) Whenever a client is in isolation time out, there shall be a state facility employee in attendance with no other immediate responsibility than to monitor the client who is placed in isolation time out. There shall be continuous observation and verbal interaction with the client when appropriate to prevent

tension from escalating. Such observation shall be documented in the client record.

(3) When restraint is used in the absence of seclusion and the client may be subject to injury, a state facility employee shall remain present with the client continuously.

(n) Reviews and reports on the use of seclusion, restraint and isolation time out shall be conducted as follows:

- (1) the State Facility Director or his designee shall review all uses of seclusion, restraint and isolation time out in a timely fashion and investigate unusual or possibly unwarranted patterns of utilization; and
(2) each State Facility Director shall maintain a log which includes the following information on each use of seclusion, restraint and isolation time out:

- (A) name of the client;
(B) name of the responsible professional;
(C) date of each intervention;
(D) time of each intervention;
(E) duration of each intervention; and
(F) reason for use of the intervention.

(o) Nothing in this Rule shall be interpreted to prohibit the use of voluntary seclusion, restraint or isolation time out at the client's request; however, the procedures in Paragraphs (a) through (n) of this Rule shall apply.

Seclusion and isolation time out shall be used only:

- (1) in those situations specified in G.S. 122C-60, which include:
(a) when the client is in imminent danger of causing injury to self or others;
(b) when substantial property damage is occurring; or
(c) as a measure of therapeutic treatment as specified in Rule .0210 of this Section; and
(2) after less restrictive measures have been attempted and have proven ineffective. Less restrictive measures that shall be considered include:
(a) counseling;
(b) environmental changes;
(c) education techniques; and
(d) interruptive or re-direction techniques.

Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 122C-62; 131E-67; 143B-147.

.0205 INDICATIONS FOR USE OF MECHANICAL RESTRAINTS

(a) Whenever protective devices are utilized for clients, the state facility shall:

- (1) ensure that the necessity for the protective device has been assessed and the device applied by a person who has been trained and clinically privileged in the utilization of protective devices;
(2) frequently observe the client and provide opportunities for toileting, exercise, etc. as needed. Protective devices which limit the client's freedom of movement shall be observed at least every two hours. Whenever the client is restrained and subject to injury by another client, a state facility employee shall remain present with the client continuously. Observations and interventions shall be documented in the client record; and
(3) document the utilization of protective devices in the client's nursing care plan, when applicable, and treatment/habilitation plan.

(b) In addition to the requirements specified in Paragraph (a) of this Rule, protective devices used for behavioral control shall comply with the requirements specified in Rule .0203 of this Section.

Restraints shall be used only:

- (1) when the client is in imminent danger of causing injury to self or others;
(2) as a measure of therapeutic treatment as specified in Rule .0210 of this Section; and
(3) after seclusion or isolation time out has been attempted, or clinically determined and documented to be inappropriate or inadequate to avoid injury.

Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 131E-67; 143B-147.

.0206 PROCEDURES: SECLUSION, RESTRAINTS, OR ISOLATION TIME OUT

(a) The interventions specified in this Rule present a significant risk to the client and therefore require additional safeguards. These procedures shall be followed in addition to the procedures specified in Rule .0203 of this Section.

(b) The following interventions are designed for the primary purpose of reducing the incidence of aggressive, dangerous or self injurious behavior to

a level which will allow the use of less intrusive treatment/habilitation procedures. Such interventions include the use of:

- (1) seclusion, restraint or isolation time out employed as a measure of therapeutic treatment;
- (2) seclusion, restraint or isolation time out used on an emergency basis more than 40 hours in a calendar month or more than one episode of 24 hours;
- (3) unpleasant tasting foodstuffs;
- (4) planned non attention to specific undesirable behaviors when the target behavior is health threatening;
- (5) contingent deprivation of any basic necessity;
- (6) contingent application of any noxious substances which include but are not limited to noise, bad smells or splashing with water; and
- (7) any potentially physically painful procedure or stimulus which is administered to the client for the purpose of reducing the frequency or intensity of a behavior.

(e) Such interventions shall never be the sole treatment modality for the elimination of target behavior. The intervention shall always be accompanied by positive treatment or habilitation methods which include the deliberate teaching and reinforcement of behaviors which are non injurious; the improvement of conditions associated with non injurious behaviors such as an enriched educational and social environment; and the alteration or elimination of environmental conditions which are reliably correlated with self injury.

(d) Prior to the implementation of any planned use of the intervention the following written approvals and notifications shall be obtained and documented in the client record:

- (1) The treatment/habilitation team shall approve the plan;
- (2) Each client whose treatment/habilitation plan includes interventions with reasonably foreseeable physical consequences shall receive an initial medical examination and periodic planned monitoring by a physician;
- (3) The treatment/habilitation team shall inform the internal client advocate that the intervention has been planned for the client and the rationale for utilization of the intervention;
- (4) The treatment/habilitation team shall

explain the intervention and the reason for the intervention to the client and the legally responsible person, if applicable. The prior written consent of the client or his legally responsible person shall be obtained except for those situations specified in Rule .0204(h)(1) in this Section. If the client or legally responsible person, if applicable, refuses the intervention, the State Facility Director shall follow the right to refuse treatment procedures as specified in this Subchapter.

- (5) The plan shall be reviewed and approved by a review committee designated by the State Facility Director. At least one member of the review committee shall be qualified through experience and training to utilize the planned intervention. No member of the review committee shall be a member of the client's treatment team.
- (6) The treatment/habilitation plan may be reviewed and approved by the State Facility Director, at his option.
- (7) If any of the persons or committees specified in Subparagraphs (d)(1), (2), (4), (5), or (6) of this Rule do not approve the continued use of a planned intervention, the planned intervention shall be terminated. The State Facility Director shall establish an appeal mechanism for the resolution of any disagreement over the use of the intervention.

(e) Neither the consents nor the approvals specified in Paragraph (d) of this Rule shall be considered valid for more than six months. The treatment/habilitation team shall re evaluate the use of the intervention and obtain the client's and legally responsible person's consent for continued use of the intervention.

(f) The plan shall be reviewed at the next meeting of the Human Rights Committee within the constraints of 10 NCAC 14G .0209. The Committee, by majority vote, may recommend approval or disapproval of the plan to the State Facility Director or may abstain from making a recommendation. If the State Facility Director does not agree with the decision of the Committee, the Committee may appeal the issue to the Division in accordance with the provisions of 10 NCAC 14G .0208.

(g) The intervention shall be used only when the

treatment/habilitation team has determined and documented in the client record the following:

- (1) that the client is engaging in behaviors that are likely to result in injury to self or others;
- (2) that other methods of treatment or habilitation employing less intrusive interventions are not appropriate;
- (3) the frequency, intensity and duration of the target behavior, and the behavior's probable antecedents and consequences; and
- (4) it is likely that the intervention will enable the client to stop the target behavior.

(h) The treatment/habilitation team shall designate a state facility employee to maintain accurate and up to date written records on the application of the intervention and accompanying positive procedures. These records shall include at a minimum the following:

- (1) data which reflect the frequency, intensity and duration with which the targeted behavior occurs (scientific sampling procedures are acceptable);
- (2) data which reflect the frequency, intensity and duration of the intervention and any accompanying positive procedures; and
- (3) data which reflect the state facility employees who administered the interventions.

(i) The interventions shall be evaluated at least weekly by the treatment team or its designee and at least monthly by the Director of Clinical Services or the State Facility Director. The designee of the State Facility Director or Director of Clinical Services shall not be a member of the client's treatment/habilitation team. Reviews shall be documented in the client record.

(j) During the use of the intervention, the Human Rights Committee shall be given the opportunity to review the treatment/habilitation plan within the constraints of 10 NCAC 14G .0209.

(a) This Rule delineates the procedures to be followed for use of seclusion, restraints, or isolation time out in addition to the procedures specified in Rule .0203 of this Section.

(b) This Rule governs the use of physical or behavioral interventions which are used to terminate a behavior or action in which a client is in imminent danger of injury to self or other persons or when substantial property damage is occurring, or which are used as a measure of therapeutic

treatment. Such interventions include seclusion, isolation time out, and mechanical restraints listed in Subparagraphs (a)(1), (2) and (3) of Rule .0203 of this Section.

(c) Seclusion, restraints, or isolation time out may only be used when other less restrictive alternatives are not feasible, as delineated in Rules .0204 and .0205 of this Section.

(d) If determined to be acceptable for use within the state facility, the State Facility director shall establish written policies and procedures that govern the use of seclusion, restraints, or isolation time out which shall include the following:

- (1) techniques for seclusion, restraints, or isolation time out which are written and approved;
- (2) provision, to both new clinical and habilitation staff as part of in-service training, and as a condition of continued employment, for those authorized to use or apply intrusive interventions which shall include, but not be limited to:
 - (A) competency-based training and periodic reviews on the use of seclusion, restraints, or isolation time out; and
 - (B) skills for less intrusive interventions specified in Rules .0203 and .0204 of this Section.

(f) Whenever a client is in seclusion, restraint or isolation time out for more than 24 continuous hours, the client's rights, as specified in G.S. 122C-62, are restricted. The documentation requirements in this Rule shall satisfy the requirements specified in G.S. 122C-62(e) for restriction of rights.

(g) Whenever seclusion, restraint or isolation time out is used more than three times within a 30-day period:

- (1) a pattern of behavior has developed and future emergencies can be reasonably predicted; and
- (2) dangerous behavior can no longer be considered unanticipated, and
- (3) emergency procedures shall be addressed as a planned intervention in the treatment/habilitation plan.

(h) In addition to the requirements in this Rule, additional safeguards as specified in Rule .0210 of this Section shall be initiated whenever:

- (1) a client exceeds spending 40 hours, or more than one episode of 24 or more continuous hours of time in emergency seclusion, restraint or isolation time out during a calendar month; or

- (2) seclusion, restraint or isolation time out is:
- (A) used as a measure of therapeutic treatment as specified in G.S. 122C-60; and
 - (B) limited to specific planned behavioral interventions designed for the extinction of dangerous, aggressive or undesirable behaviors.
- (i) The written approval of the State Facility Director or designee shall be required when seclusion, restraint or isolation time out is utilized for longer than 24 continuous hours.
- (j) Standing orders or PRN orders shall not be used to authorize the use of seclusion, restraint or isolation time out.
- (k) The client shall be removed from seclusion, restraint or isolation time out when:
- (1) the client no longer demonstrates the behavior which precipitated the seclusion, restraint or isolation time out; however,
 - (2) in no case shall the client remain in seclusion, restraint or isolation time out longer than an hour after gaining behavioral control; and
 - (3) if the client is unable to gain self-control within the time frame specified in the authorization, a new authorization must be obtained.
- (l) Whenever seclusion, restraints, or isolation time out are used on an emergency basis prior to inclusion in the treatment/ habilitation plan, the following procedures shall be followed:
- (1) a state facility employee authorized to administer emergency interventions may employ such procedures for up to 15 minutes without further authorization.
 - (2) a qualified professional may authorize the continued use of seclusion, restraints, or isolation time out for up to one hour from the initial employment of the intervention if he:
 - (A) has experience and training in the use of seclusion, restraints, or isolation time out; and
 - (B) has been privileged to employ such interventions.
 - (3) If a qualified professional is not immediately available to conduct a face-to-face assessment of the client, but after discussion with the state facility employee, the qualified professional concurs that the intervention is justified for longer than 15 minutes, then he:
 - (A) may verbally authorize the continuation of the intervention for up to one hour;
 - (B) shall meet with and assess the client within one hour after authorizing the continued use of the intervention; and
 - (C) shall immediately consult with the professional responsible for the client's treatment/habilitation plan, if the intervention needs to be continued for longer than one hour.
- (4) The responsible professional shall authorize the continued use of seclusion, restraints, or isolation time out for periods over one hour.
- (5) If the responsible professional is not immediately available to conduct a clinical assessment of the client, but after discussion with the qualified professional concurs that the intervention is justified for longer than one hour the responsible professional:
- (A) may verbally authorize the continuation of the intervention until an onsite assessment of the client can be made; however,
 - (B) if such authorization cannot be obtained, the intervention shall be discontinued.
- (6) If the responsible professional and the qualified professional are the same person, the documentation requirements of this rule can be done at the time of the documentation required by Subparagraph .0206(d)(5) of this Section.
- (7) The responsible professional, or if the responsible professional is unavailable, the on-service or covering professional, shall meet with and assess the client within three hours after the client is first placed in seclusion, restraints, or isolation time out, and document in detail:
- (A) the reasons for continuing seclusion, restraints, or isolation time out; and
 - (B) the client's response to the intervention.
- In addition, the responsible professional shall provide an evaluation of the episode and propose recommendations regarding specific means for preventing future episodes. Clients who have been placed in seclusion, restraints, or

isolation time out and released in less than three hours shall be examined by the responsible professional who authorized the intervention no later than 24 hours after the episode.

- (8) Each incident shall be reviewed by the treatment team, which shall include possible alternative actions and specific means for preventing future episodes.
- (m) While the client is in seclusion, restraint or isolation time out, the following precautions shall be followed:

- (1) Whenever a client is in seclusion:
- (A) periodic observation of the client shall occur at least every 15 minutes, or more often as necessary, to assure the safety of the client. Observation may include direct line of sight or the use of video surveillance;
 - (B) appropriate attention shall be paid to the provision of regular meals, bathing and the use of the toilet; and
 - (C) such observation and attention shall be documented in the client record.
- (2) Whenever a client is in restraint, the facility must provide:
- (A) the degree of observation needed to assure the safety of those placed in restraint. The degree of observation needed is determined at the time of application of the restraint after consideration of the following:
 - (i) the type of restraint used;
 - (ii) the individual patient situation; and
 - (iii) the existence of any specific manufacturer's warning concerning the safe use of a particular product.Observation may include direct line of sight or the use of video surveillance. In no instance should observation be less frequent than at 15-minute intervals.
 - (B) appropriate attention to the provision of regular meals, bathing and the use of the toilet; and
 - (C) documentation of the above observation and attention in the client record.
- (3) Whenever a client is in isolation time out there shall be:
- (A) a state facility employee in attendance with no other immediate responsibility than to monitor the client who is

- placed in isolation time out; continuous observation and verbal interaction with the client when appropriate to prevent tension from escalating; and documentation of such observation and verbal interaction in the client record.

(n) Reviews and reports on the use of seclusion, restraints, or isolation time out shall be conducted as follows:

- (1) the State Facility Director or designee shall review all uses of seclusion, restraints, or isolation time out in a timely fashion and investigate unusual or possibly unwarranted patterns of utilization; and
 - (2) each State Facility Director shall maintain a log which includes the following information on each use of seclusion, restraints, or isolation time out:
 - (A) name of the client;
 - (B) name of the responsible professional;
 - (C) date of each intervention;
 - (D) time of each intervention;
 - (E) duration of each intervention.
- (o) Nothing in this Rule shall be interpreted to prohibit the use of voluntary seclusion, restraints, or isolation time out at the client's request; however, the procedures in Paragraphs (a) through (m) of this Rule shall apply.

Statutory Authority G.S. 122C-51; 122C-53; 122C-57; 122C-60; 122C-62; 131E-67; 143B-147.

.0207 PROTECTIVE DEVICES

(a) The state facility shall follow the Rules in 10 NCAC 14F .0600, G.S. 122C-57, and G.S. Chapter 90, Articles 1, 4A and 9A when utilizing drugs or medication.

(b) The use of experimental drugs or medication shall be considered research and shall be governed by 10 NCAC 14G .0305 and .0306 and G.S. 122C-57(f).

(c) Each state facility which allows the use of neuroleptic medications shall establish the following policies and procedures relative to utilization of such medications and safeguards for prevention of tardive dyskinesia:

- (1) state facility plan for neuroleptic medication education;
- (2) procedures for obtaining and renewing informed consent whenever neuroleptic drug therapy is administered for a

- period in excess of ten weeks. If the client's documented history reflects previous neuroleptic drug therapy for a period of ten weeks or more, written informed consent will be required prior to initiation of additional neuroleptic drug therapy. Whenever consent cannot be obtained, the Rules specified in Section .0400 of this Subchapter may be implemented:
- (3) methods for minimizing the risk of tardive dyskinesia by prescribing neuroleptic medication judiciously in low doses for short intervals;
 - (4) training aimed at education of state facility employees regarding indications for using neuroleptic medication, expected therapeutic effects of neuroleptic medication and common side effects including indications of tardive dyskinesia; and
 - (5) procedures for monitoring clients on neuroleptic medications for signs of tardive dyskinesia including the following:
 - (A) designation of a standardized rating system;
 - (B) frequency of client ratings whenever tardive dyskinesia is detected or when pre-existing tardive dyskinesia increases in severity; and
 - (C) training of designated raters in the selected methodology.
- (a) Whenever protective devices that cannot be removed at will by the client are utilized for clients, the state facility shall:
- (1) assure that the protective restraint shall be used only to promote the client's physical safety;
 - (2) assure that the factors putting the client's physical safety at risk are fully explored and addressed in treatment planning;
 - (3) document the utilization of protective devices in the client's nursing care plan, when applicable, and treatment/habilitation plan;
 - (4) document what less restrictive alternatives were considered, whether those alternatives were tried, and why those alternatives were unsuccessful;
 - (5) assure that the protective restraint is used only upon the written order of a qualified professional that specifies the type of restraint and the duration and circumstances under which the protective restraint is used;
- (6) assure and document that the staff applying the protective restraint is properly trained to do so;
- (7) inspect to ensure that the devices are in good repair and free of tears and protrusions;
- (8) Determine, at the time of application of the restraint, the degree of observation needed to assure the safety of those placed in restraints:
- (A) The type of restraint used, the individual patient situation, and the existence of any specific manufacturer's warning concerning the safe use of a particular product should all be considered in determining the degree of observation needed.
 - (B) Observation may include direct line of sight or the use of video surveillance.
 - (C) In no instance should observation be less frequent than at 30-minute intervals.
- (9) assure that whenever the client is restrained and subject to injury by another client, a state facility employee shall remain present with the client continuously;
- (10) assure that the person is released as needed, but at least every two hours;
- (11) re-evaluate need for and impact on client of protective restraint at least every 30 days; and
- (12) assure that observations and interventions shall be documented in the client record.
- (b) In addition to the requirements specified in Paragraph (a) of this Rule, protective devices used for behavioral control shall comply with the requirements specified in Rule .0203 of this Section.

Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 131E-67; 143B-147.

.0210 INTERVENTIONS REQUIRING ADDITIONAL SAFEGUARDS

- (a) The interventions specified in this Rule present a significant risk to the client and therefore require additional safeguards. These procedures shall be followed in addition to the procedures specified in Rule .0203 of this Section.
- (b) The following interventions are designed for the primary purpose of reducing the incidence of

aggressive, dangerous or self injurious behavior to a level which will allow the use of less intrusive treatment/habilitation procedures. Such interventions include the use of:

- (1) seclusion, restraints, or isolation time out employed as a measure of therapeutic treatment;
- (2) seclusion, restraints, or isolation time out used on an emergency basis more than 40 hours in a calendar month or more than one episode of 24 hours;
- (3) unpleasant tasting foodstuffs;
- (4) planned non-attention to specific undesirable behaviors when the target behavior is health threatening;
- (5) contingent deprivation of any basic necessity;
- (6) contingent application of any noxious substances which include but are not limited to noise, bad smells or splashing with water; and
- (7) any potentially physically painful procedure or stimulus which is administered to the client for the purpose of reducing the frequency or intensity of a behavior.

(c) Such interventions shall never be the sole treatment modality for the elimination of target behavior.

(d) The intervention shall always be accompanied by positive treatment or habilitation methods which shall include, but not be limited to:

- (1) the deliberate teaching and reinforcement of behaviors which are non-injurious;
- (2) the improvement of conditions associated with noninjurious behaviors such as an enriched educational and social environment; and
- (3) the alteration or elimination of environmental conditions which are reliably correlated with self-injury.

(d) Prior to the implementation of any planned use of the intervention the following written approvals and notifications shall be obtained. Documentation in the client record shall include:

- (1) approval of the plan by the treatment/habilitation team;
- (2) that each client whose treatment/habilitation plan includes interventions with reasonably foreseeable physical consequences shall receive an initial medical examination and periodic planned monitoring by a physician;
- (3) that the treatment/habilitation team shall

inform the internal client advocate that the intervention has been planned for the client and the rationale for utilization of the intervention.

- (4) the treatment/habilitation team shall explain the intervention and the reason for the intervention to the client and the legally responsible person, if applicable.
- (5) the prior written consent of the client or his legally responsible person shall be obtained except for those situations specified in Rule .0206(h)(1) in this Section. If the client or legally responsible person refuses the intervention, the State Facility Director shall follow the right to refuse treatment procedures as specified in this Subchapter;
- (6) that the plan shall be reviewed and approved by a review committee, designated by the State Facility Director, which shall include that:
 - (A) at least one member of the review committee shall be qualified through experience and training to utilize the planned intervention; and
 - (B) no member of the review committee shall be a member of the client's treatment team.
- (7) that the treatment/habilitation plan shall be reviewed and approved by the State Facility Director;
- (8) if any of the persons or committees specified in Subparagraphs (d)(1), (2), (4), (5), or (6) of this Rule do not approve the continued use of a planned intervention, the planned intervention shall be terminated. The State Facility Director shall establish an appeal mechanism for the resolution of any disagreement over the use of the intervention.

(e) Neither the consents nor the approvals specified in Paragraph (d) of this Rule shall be considered valid for more than six months. The treatment/habilitation team shall re-evaluate the use of the intervention and obtain the client's and legally responsible person's consent for continued use of the intervention.

(f) The plan shall be reviewed at the next meeting of the Human Rights Committee within the constraints of 10 NCAC 14G .0209. The Committee, by majority vote, may recommend approval or disapproval of the plan to the State Facility Director or may abstain from making a recommenda-

tion. If the State Facility Director does not agree with the decision of the Committee, the Committee may appeal the issue to the Division in accordance with the provisions of 10 NCAC 14G .0208.

(g) The intervention shall be used only when the treatment/habilitation team has determined and documented in the client record the following:

- (1) that the client is engaging in behaviors that are likely to result in injury to self or others;
- (2) that other methods of treatment or habilitation employing less intrusive interventions are not appropriate;
- (3) the frequency, intensity and duration of the target behavior, and the behavior's probable antecedents and consequences; and
- (4) it is likely that the intervention will enable the client to stop the target behavior.

(h) The treatment/habilitation team shall designate a state facility employee to maintain accurate and up-to-date written records on the application of the intervention and accompanying positive procedures. These records shall include at a minimum the following:

- (1) data which reflect the frequency, intensity and duration with which the targeted behavior occurs (scientific sampling procedures are acceptable);
- (2) data which reflect the frequency, intensity and duration of the intervention and any accompanying positive procedures; and
- (3) data which reflect the state facility employees who administered the interventions.

(i) The interventions shall be evaluated at least weekly by the treatment team or its designee and at least monthly by the Director of Clinical Services or the State Facility Director. The designee of the State Facility Director or Director of Clinical Services shall not be a member of the client's treatment/habilitation team. Reviews shall be documented in the client record.

(j) During the use of the intervention, the Human Rights Committee shall be given the opportunity to review the treatment/ habilitation plan within the constraints of 10 NCAC 14G .0209.

Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 122C-62; 131E-67; 143B-147.

SUBCHAPTER 14L - LICENSURE

RULES FOR MENTAL HEALTH FACILITIES

SECTION .0400 - PSYCHOSOCIAL REHABILITATION FACILITIES FOR INDIVIDUALS WHO ARE CHRONICALLY MENTALLY ILL

.0407 EMPLOYMENT SERVICES

(a) Each facility shall provide or secure through the Division of Vocational Rehabilitation Services transitional or supported employment services to facilitate client entry into competitive employment. Full use shall be made of existing community resources to accomplish this including applying for funds available from Division of Vocational Rehabilitation Services.

(b) When supported employment services are provided by the facility, the following requirements shall be met:

- (1) Each client shall be one for whom competitive employment has not traditionally occurred or has been interrupted or intermittent as a result of severe mental illness.
- (2) Each client shall be employed in an integrated work setting for twenty or more hours per week.
- (3) Supported employment may be provided through:
 - (A) work stations for a group of eight or fewer workers trained and supervised in an industry or business;
 - (B) job coaching and supervision of individuals in an industry or business;
 - (C) mobile crew service jobs by a group of eight or fewer workers in the community under the training and supervision of a crew leader; and
 - (D) small business enterprises operated with eight or fewer workers with training and supervision provided on site.

(c) When transitional employment services are provided by the facility, the following requirements shall be met:

- (1) There shall be a contract between the facility and employer for a specific job and the job shall first be performed by a facility staff member to determine the technical requirements of the job.
- (2) The selection of a client to fill a placement is the responsibility of the facility and the individual client.
- (d) Wages shall be paid in accordance with the

Fair Labor Standards Act for all clients receiving supported employment and transitional employment services.

Statutory Authority G.S. 122C-26; 143B-147.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to adopt rule cited as 10 NCAC 26B .0112. The agency has requested that this adoption (Psychiatric Admission Criteria for Medicaid Beneficiaries Under Age 21) be inserted as 10 NCAC 26B .0112 and the existing 26B .0112 and all other subsequent numbers in Section .0100 of Chapter 26B be renumbered accordingly.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 1:30 p.m. on August 2, 1993 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 132, Raleigh, NC 27603.

Reason for Proposed Action: This rule is needed to establish Medicaid criteria for Admissions of children and adolescents under age 21 for inpatient psychiatric services.

Comment Procedures: Written comments concerning this adoption must be submitted by August 2, 1993, to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603 ATTN: Clarence Ervin, APA Coordinator. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request from the same address.

CHAPTER 26 - MEDICAL ASSISTANCE

SUBCHAPTER 26B - MEDICAL ASSISTANCE PROVIDED

SECTION .0100 - GENERAL .0112 PSYCHIATRIC ADMISSION CRITERIA/MEDICAID BENEFICIARIES UNDER AGE 21

Medicaid criteria for the admission of children

and adolescents under age twenty-one (21) to psychiatric hospitals or psychiatric units of general hospitals is limited herein. To be approved for admission, the patient must meet criteria (1), (2) and (3) as follows:

- (1) Client meets criteria for one or more DSM-III-R (Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised-- a manual whose purpose is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat various mental disorders) diagnoses; and
- (2) At least one or more of the following criteria:
 - (a) Client is presently a danger to self (e.g., engages in self-injurious behavior, has a significant suicide potential, or is acutely manic). This usually would be indicated by one of the following:
 - (i) Client has made a suicide attempt or serious gesture (e.g., overdose, hanging, jumping from or placing self in front of moving vehicle, self-inflicted gunshot wound), or is threatening same with likelihood of acting on the threat, and there is an absence of the appropriate supervision or structure to prevent suicide.
 - (ii) Client manifests a significant depression, including current contemplation of suicide or suicidal ideation, and there is an absence of the appropriate supervision or structure to prevent suicide.
 - (iii) Client has a history of affective disorder:
 - (A) with mood which has fluctuated to the manic phase, or
 - (B) has destabilized due to stressors or non-compliance with treatment.
 - (iv) Client is exhibiting self-injurious behavior (cutting on self, burning self) or is threatening same with likelihood of acting on the threat; or
 - (b) Client engages in actively violent, aggressive or disruptive behavior or client exhibits homicidal ideation or other symptoms which indicate he/she is a probable danger to others. This usually would be indicated by one of the following:
 - (i) Client whose evaluation and treatment

- cannot be carried out safely or effectively in other settings due to impulsivity, impaired judgment, severe oppositionalism, running away, severely disruptive behaviors at home or school, self-defeating and self-endangering activities, antisocial activity, and other behaviors which may occur in the context of a dysfunctional family and may also include physical, psychological, or sexual abuse.
- (ii) Client exhibits serious aggressive, assaultive, or sadistic behavior that is harmful to others (e.g., assaults with or without weapons, provocations of fights, gross aggressive over-reactivity to minor irritants, harming animals) or is threatening same with likelihood of acting on the threat. This behavior should be attributable to the client's specific DSM-III-R diagnosis and can be adequately treated only in a hospital setting; or
- (c) Acute onset of psychosis or severe thought disorganization or clinical deterioration in condition of chronic psychosis rendering the client unmanageable and unable to cooperate in treatment. This usually would be indicated by the following: Client has recent onset or aggravated psychotic symptoms (e.g., disorganized or illogical thinking, hallucinations, bizarre behavior, paranoia, delusions, incongruous speech, severely impaired judgment) and is resisting treatment or is in need of assessment in a safe and therapeutic setting; or
- (d) Presence of medication needs, or a medical process or condition which is life-threatening (e.g., toxic drug level) or which requires the acute care setting for its treatment. This usually would be indicated by one of the following:
- (i) Proposed treatments require close medical observation and monitoring to include, but not limited to, close monitoring for adverse medication effects, capacity for rapid response to adverse effects, and use of medications in clients with concomitant serious medical problems.
- (ii) Client has a severe eating disorder or substance abuse disorder which requires 24-hour-a-day medical observation, supervision, and intervention.
- (iii) Client has Axis I and/or Axis II diagnosis, with a complicating or interacting Axis III diagnosis, the combination of which requires psychiatric hospitalization in keeping with any one of these criteria, and with the Axis III diagnosis treatable in a psychiatric setting (e.g., diabetes, malignancy, cystic fibrosis); or
- (e) Need for medication therapy or complex diagnostic evaluation where the client's level of functioning precludes cooperation with the treatment regimen, including forced administration of medication. This usually would be indicated by one of the following:
- (i) Client whose diagnosis and clinical picture is unclear and who requires 24 hour clinical observation and assessment by a multi-disciplinary hospital psychiatric team to establish the diagnosis and treatment recommendations.
- (ii) Client is involved in the legal system (e.g., in a detention or training school facility) and manifests psychiatric symptoms (e.g., psychosis, depression, suicide attempts or gestures) and requires a comprehensive assessment in a hospital setting to clarify the diagnosis and treatment needs; and
- (3) To meet the federal requirement at 42 CFR 441.152, all of the following must apply:
- (a) Ambulatory care resources available in the community do not meet the treatment needs of the recipient.
- (b) Proper treatment of the recipient's psychiatric condition requires services on an inpatient basis under the direction of a physician.
- (c) The services can reasonably be expected to improve the recipient's condition or prevent further regression so that services will no longer be needed.

Authority G.S. 108A-25(b); 108A-54; 42 C.F.R. 441, Subpart D; 42 C.F.R. 441.151.

TITLE 11 - DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to amend rule cited as 11 NCAC 16 .0205.

The proposed effective date of this action is October 1, 1993.

Instructions on How to Demand a Public Hearing:
A request for a public hearing must be made in writing, addressed to Ellen K. Sprenkel, N.C. Department of Insurance, P. O. Box 26387, Raleigh, N. C. 27611. This request must be received within 15 days of this notice.

Reason for Proposed Action: Clarification necessary to resolve misinterpretation of current language by insurance companies.

Comment Procedures: Written comments may be sent to Walter James, Actuarial Services, P. O. Box 26387, Raleigh, N.C. 27611. Anyone having questions may call Walter James at (919) 733-3284 or Ellen K. Sprenkel at (919) 733-4529.

CHAPTER 16 - ACTUARIAL SERVICES DIVISION

SECTION .0200 - INDIVIDUAL ACCIDENT AND HEALTH INSURANCE

.0205 DATA REQUIREMENTS FOR RATE REVISION SUBMISSION

With respect to any individual accident and health insurance policy governed by Articles 1 through 64 of Chapter 58 for which an adjustment of premium rate to in force policies is allowed by law, the insurer shall submit an actuarial memorandum describing and demonstrating the development of any requested premium rate revision. The actuarial memorandum shall contain a subsection clearly identified as "Additional Data Requirements." The initial rate revision filing shall be submitted to and stamped received by the Department's Life and Health Division. An insurer shall submit all data required by this Rule within 45 days after the date that the initial rate revision filing is stamped received. Subsequent data submissions on incomplete initial rate revision filings shall be made directly to the Department's

Actuarial Services Division within the 45 day period. An insurer may continue to submit data in accordance with data submission procedures followed before the effective date of this Rule for a period not to exceed one year after the effective date of this Rule if an authorized officer of the insurer certifies to the Commissioner that the insurer's current information system cannot assemble data as required by this Rule. The data required in the "Additional Data Requirements" subsection shall include:

- (1) Identification of the submitted data as North Carolina or countrywide and consistent use of this data identification throughout this Section.
- (2) Identification of all policy forms by approved North Carolina policy form number.
- (3) The month, year, and percentage amount of all previous rate revisions.
- (4) The month and year that the rate revision is scheduled to be implemented (hereinafter referred to as the "implementation date").
- (5) The type of renewability provision contained in each policy form, e.g. guaranteed renewable.
- (6) The type of coverage provided by each policy form, e.g. medical expense.
- (7) The National Association of Insurance Commissioners minimum guideline loss ratio and, if different, the insurer's minimum guideline loss ratio.
- (8) The average annual premium for North Carolina and countrywide before and after the implementation of the rate revision.
- (9) The number of North Carolina and countrywide policyholders affected by the rate revision.
- (10) The requested rate revision percentage attributable to experience.
- (11) The requested rate revision percentage attributable to changes in benefits promulgated by Medicare, if applicable.
- (12) Identification and actuarial justification of all groupings of policy forms.
- (13) The historical calendar year earned premium subdivided by duration and expressed on an actual and a current premium rate basis for the period of time from the earliest date that experience is recorded to the most recent date experience is recorded.
- (14) ~~The "expected" incurred loss ratios for~~

- duration one through the duration selected by the insurer which does not exceed the duration coinciding with the fifth year following the implementation date. The "expected" incurred loss ratios by duration based upon original pricing assumptions for duration one through the latest duration contained within the fifth year following the implementation date.
- (15) The "expected" lapse rates for duration one through the duration selected by the insurer which does not exceed the duration coinciding with the fifth year following the implementation date. The "expected" lapse rates by duration based upon original pricing assumptions for duration one through the latest duration contained within the fifth year following the implementation date.
- (16) The "actual" lapse rates for duration one through the duration coinciding with the calendar year for which the most recent experience is recorded.
- (17) The historical calendar year incurred claims, for other than Medicare supplement insurance, covering the period of time from the earliest date that experience is recorded to the most recent date experience is recorded.
- (18) The historical calendar year incurred claims, for Medicare supplement insurance, expressed on an actual and a current benefit level basis covering the period of time from the earliest date experience is recorded to the most recent date experience is recorded.
- (19) An estimation of the amount of policy year exposure contributed by all policy-holders within each calendar year of data provided.
- (20) A statement declaring whether this is an open block of business or a closed block of business.
- (21) An estimation of the annual earned premium on new issues for the period of time from the date that the most recent experience is last recorded to a date not exceeding the fifth year following the implementation date.
- (22) The number of months that the rate will be guaranteed to an individual policyholder.
- (23) The rate revision implementation method, such as the next premium due date following a given date, the next policy anniversary date, or otherwise; if otherwise, an explanation must be included.
- (24) A statement declaring the month and year of the earliest anticipated date of the next rate revision.
- (25) An explanation and actuarial justification of the apportionment of the aggregate rate revision within each policy form or between policy forms that have been grouped; and a demonstration that the apportionment of the aggregate rate revision yields the same premium income as if the rate revision had been applied uniformly.
- (26) An explanation and actuarial justification, if applicable, for changing any factor that affects the premium.
- (27) An explanation of the effect that the rate revision will have on the incurred loss ratio on those policies in force for three years or more as exhibited in the Medicare Supplement Experience Exhibit of the Annual Statement.
- (28) The name, address, and telephone number of an insurance company representative who will be available to answer questions relating to the rate revision.

Statutory Authority G.S. 58-2-40(1); 58-51-95; 58-63-15(7)b.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Environmental Management Commission intends to amend rules cited as 15A NCAC 2B .0216 and .0311.

The proposed effective date of this action is February 1, 1994.

The public hearing will be conducted at 7:00 p.m. on September 2, 1993 at the Sampson County Courthouse, 2nd Floor Courtroom, Main Street, Clinton, NC.

Reason for Proposed Action: To amend the surface water quality classifications of streams in the Cape Fear River Basin. The proposal is to designate a portion of the Black River Basin as

Outstanding Resource Waters.

Comment Procedures: All persons interested in these matters are invited to attend. Comments, statements, data and other information may be submitted in writing prior to, during or within 30 days after the hearing or may be presented verbally at the hearing. Verbal statements may be limited at the discretion of the hearing officer. Submittal of written copies of verbal statements is encouraged.

CHAPTER 2 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 2B - SURFACE WATER STANDARDS: MONITORING

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS OF NORTH CAROLINA

.0216 OUTSTANDING RESOURCE WATERS

(a) General. In addition to the existing classifications, the Commission may classify certain unique and special surface waters of the state as outstanding resource waters (ORW) upon finding that such waters are of exceptional state or national recreational or ecological significance and that the waters have exceptional water quality while meeting the following conditions:

- (1) there are no significant impacts from pollution with the water quality rated as excellent based on physical, chemical or biological information;
- (2) the characteristics which make these waters unique and special may not be protected by the assigned narrative and numerical water quality standards.

(b) Outstanding Resource Values. In order to be classified as ORW, a water body must exhibit one or more of the following values or uses to demonstrate it is of exceptional state or national recreational or ecological significance:

- (1) there are outstanding fish (or commercially important aquatic species) habitat and fisheries;
- (2) there is an unusually high level of water-based recreation or the potential for such recreation;
- (3) the waters have already received some special designation such as a North

Carolina or National Wild and Scenic River, Native or Special Native Trout Waters, National Wildlife Refuge, etc, which do not provide any water quality protection;

- (4) the waters represent an important component of a state or national park or forest; or
- (5) the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education.

(c) Quality Standards for ORW.

- (1) Freshwater: Water quality conditions shall clearly maintain and protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values will be developed on a site specific basis during the proceedings to classify waters as ORW. At a minimum, no new discharges or expansions of existing discharges will be permitted, and stormwater controls for all new development activities requiring an Erosion and Sedimentation Control Plan in accordance with rules established by the NC Sedimentation Control Commission or an appropriate local erosion and sedimentation control program will be required to control stormwater runoff as follows:

- (A) Low Density Option: Developments which limit single family developments to one acre lots and other type developments to 12 percent built-upon area, have no stormwater collection system as defined in 15A NCAC 2H .1002(13), and have built-upon areas at least 30 feet from surface water areas will be deemed to comply with this requirement, unless it is determined that additional runoff control measures are required to protect the water quality of Outstanding Resource Waters necessary to maintain existing and anticipated uses of those waters, in which case such additional stormwater runoff control measures may be required on a case-by-case basis.

- (B) High Density Development: Higher density developments will be allowed if stormwater control systems utilizing wet detention ponds as described in 15A NCAC 2H .1003(i), (k) and (l)

are installed, operated and maintained which control the runoff from all built-upon areas generated from one inch of rainfall, unless it is determined that additional runoff control measures are required to protect the water quality of Outstanding Resource Waters necessary to maintain existing and anticipated uses of those waters, in which case such additional stormwater runoff control measures may be required on a case-by-case basis. The size of the control system must take into account the runoff from any pervious surfaces draining to the system.

- (2) Saltwater: Water quality conditions shall clearly maintain and protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values will be developed on a site-specific basis during the proceedings to classify waters as ORW. At a minimum, new development will comply with the low density options as specified in the Stormwater Runoff Disposal rules [15A NCAC 2H .1003 (a)(2)] within 575 feet of the mean high water line of the designated ORW area. New non-discharge permits will be required to meet reduced loading rates and increased buffer zones, to be determined on a case-by-case basis. No dredge or fill activities will be allowed where significant shellfish or submerged aquatic vegetation bed resources occur, except for maintenance dredging, such as that required to maintain access to existing channels and facilities located within the designated areas or maintenance dredging for activities such as agriculture. A public hearing is mandatory for any proposed permits to discharge to waters classified as ORW.

Additional actions to protect resource values will be considered on a site specific basis during the proceedings to classify waters as ORW and will be specified in Paragraph (e) of this Rule. These actions may include anything within the powers of the commission. The commission will also consider local actions which have been taken to protect a water body in determining the appropriate state protection options. Descriptions of boundaries of waters classified as ORW are included in Para-

graph (e) of this Rule and in the Schedule of Classifications (15A NCAC 2B .0302 through .0317) as specified for the appropriate river basin and will also be described on maps maintained by the Division of Environmental Management.

(d) Petition Process. Any person may petition the Commission to classify a surface water of the state as an ORW. The petition shall identify the exceptional resource value to be protected, address how the water body meets the general criteria in Paragraph (a) of this Rule, and the suggested actions to protect the resource values. The Commission may request additional supporting information from the petitioner. The Commission or its designee will initiate public proceedings to classify waters as ORW or will inform the petitioner that the waters do not meet the criteria for ORW with an explanation of the basis for this decision. The petition shall be sent to:

Director
DEHNR/Division of Environmental Management
P.O. Box 29535

Raleigh, North Carolina 27626-0535

The envelope containing the petition shall clearly bear the notation: RULE-MAKING PETITION FOR ORW CLASSIFICATION.

(e) Listing of Waters Classified ORW with Specific Actions. Waters classified as ORW with specific actions to protect exceptional resource values are listed as follows:

(1) Roosevelt Natural Area [White Oak River Basin, Index Nos. 20-36-9.5-(1) and 20-36-9.5-(2)] including all fresh and saline waters within the property boundaries of the natural area will have only new development which complies with the low density option in the stormwater rules as specified in 15A NCAC 2H .1003(a)(2) within 575 feet of the Roosevelt Natural Area (if the development site naturally drains to the Roosevelt Natural Area).

(2) Chattooga River ORW Area (Little Tennessee River Basin and Savannah River Drainage Area): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Rule .0216 Paragraph (c) of this Section Rule in order to protect the designated waters as per Rule .0203 of this Section. However, expansions of existing discharges to these segments will be allowed if there is no increase in pollutant loading;

- (A) North and South Fowler Creeks,
 - (B) Green and Norton Mill Creeks,
 - (C) Cane Creek,
 - (D) Ammons Branch,
 - (E) Glade Creek, and
 - (F) Associated tributaries.
- (3) Henry Fork ORW Area (Catawba River Basin): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with ~~Rule .0216 Paragraph~~ (c) of this ~~Section Rule~~ in order to protect the designated waters as per Rule .0203 of this Section:
- (A) Ivy Creek,
 - (B) Rock Creek, and
 - (C) Associated tributaries.
- (4) South Fork New and New Rivers ORW Area [New River Basin (Index Nos. 10-1-33.5 and 10)]: the following management strategies, in addition to the discharge requirements specified in Rule .0216(c)(1), will be applied to protect the designated ORW areas:
- (A) Stormwater controls described in Rule .0216(c)(1) will apply within one mile and draining to the designated ORW areas;
 - (B) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW will be permitted such that the following water quality standards are maintained in the ORW segment:
 - (i) the total volume of treated wastewater for all upstream discharges combined will not exceed 50 percent of the total instream flow in the designated ORW under 7Q10 conditions;
 - (ii) a safety factor will be applied to any chemical allocation such that the effluent limitation for a specific chemical constituent will be the more stringent of either the limitation allocated under design conditions (pursuant to 15A NCAC 2B .0206) for the normal standard at the point of discharge, or the limitation allocated under design conditions for one-half the normal standard at the upstream border of the ORW segment;
 - (iii) a safety factor will be applied to any discharge of complex wastewater (those containing or potentially containing toxicants) to protect for chronic toxicity in the ORW segment by setting the whole effluent toxicity limitation at the higher (more stringent) percentage effluent determined under design conditions (pursuant to 15A NCAC 2B .0206) for either the instream effluent concentration at the point of discharge or twice the effluent concentration calculated as if the discharge were at the upstream border of the ORW segment;
- (C) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW will comply with the following:
- (i) Oxygen Consuming Wastes: Effluent limitations will be as follows: BOD = 5 mg/l, and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) will be limited to effluent concentrations of 10 mg/l for trout waters and to 20 mg/l for all other waters;
 - (iii) Emergency Requirements: Failsafe treatment designs will be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, appropriate effluent limitations will be set for phosphorus or nitrogen, or both.
- (5) Old Field Creek (New River Basin): the undesignated portion of Old Field Creek (from its source to Call Creek) shall comply with Rule .0216(c) of this Section in order to protect the designated waters as per Rule .0203 of this Section.
- (6) In the following designated waterbodies, no additional restrictions will be placed on new or expanded marinas. The only new or expanded NPDES permitted discharges that will be allowed will be non-domestic,

- non-process industrial discharges.
- (A) The Alligator River Area (Pasquotank River Basin) extending from the source of the Alligator River to the U.S. Highway 64 bridge including New Lake Fork, North West Fork Alligator River, Juniper Creek, Southwest Fork Alligator River, Scouts Bay, Gum Neck Creek, Georgia Bay, Winn Bay, Stumpy Creek Bay, Stumpy Creek, Swann Creek (Swann Creek Lake), Whipping Creek (Whipping Creek Lake), Grapevine Bay, Rattlesnake Bay, The Straits, The Frying Pan, Coopers Creek, Babbitt Bay, Goose Creek, Milltail Creek, Boat Bay, Sandy Ridge Gut (Sawyer Lake) and Second Creek, but excluding the Intracoastal Waterway (Pungo River-Alligator River Canal) and all other tributary streams and canals.
- (7) In the following designated waterbodies, the only type of new or expanded marina that will be allowed will be those marinas located in upland basin areas, or those with less than 30 slips, having no boats over 21 feet in length and no boats with heads. The only new or expanded NPDES permitted discharges that will be allowed will be non-domestic, non-process industrial discharges.
- (A) The Northeast Swanquarter Bay Area including all waters northeast of a line from a point at Lat. $35^{\circ} 23' 51''$ and Long. $76^{\circ} 21' 02''$ thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point.
- (B) The Neuse-Southeast Pamlico Sound Area (Southeast Pamlico Sound Area (Southeast Pamlico Sound Section of the Southeast Pamlico, Core and Back Sound Area); (Neuse River Basin) including all waters within an area defined by a line extending from the southern shore of Ocracoke Inlet northwest to the Tar-Pamlico River and Neuse River basin boundary, then southwest to Ship Point.
- (C) The Core Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin), including all waters of Core Sound and its tributaries, but excluding Nelson Bay, Little Port Branch and Atlantic Harbor at its mouth, and those tributaries of Jarrett Bay that are closed to shellfishing.
- (D) The Western Bogue Sound Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from Bogue Inlet to the mainland at SR 1117 to a line across Bogue Sound from the southwest side of Gales Creek to Rock Point, including Taylor Bay and the Intracoastal Waterway.
- (E) The Stump Sound Area (Cape Fear River Basin) including all waters of Stump Sound and Alligator Bay from marker Number 17 to the western end of Permuda Island, but excluding Rogers Bay, the Kings Creek Restricted Area and Mill Creek.
- (F) The Topsail Sound and Middle Sound Area (Cape Fear River Basin) including all estuarine waters from New Topsail Inlet to Mason Inlet, including the Intracoastal Waterway and Howe Creek, but excluding Pages Creek and Futch Creek.
- (8) In the following designated waterbodies, no new or expanded NPDES permitted discharges and only new or expanded marinas with less than 30 slips, having no boats over 21 feet in length and no boats with heads will be allowed.
- (A) The Swanquarter Bay and Juniper Bay Area (Tar-Pamlico River Basin) including all waters within a line beginning at Juniper Bay Point and running south and then west below Great Island, then northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding all waters northeast of a line from a point at Lat. $35^{\circ} 23' 51''$ and Long. $76^{\circ} 21' 02''$ thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point and also excluding the Blowout Canal,

- Hyde Canal, Juniper Canal and Quarter Canal.
- (B) The Back Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin) including that area of Back Sound extending from Core Sound west along Shackleford Banks, then north to the western most point of Middle Marshes and along the northwest shore of Middle Marshes (to include all of Middle Marshes), then west to Rush Point on Harker's Island, and along the southern shore of Harker's Island back to Core Sound.
- (C) The Bear Island Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from the western most point on Bear Island to the northeast mouth of Goose Creek on the mainland, east to the southwest mouth of Queen Creek, then south to green marker No. 49, then northeast to the northern most point on Huggins Island, then southeast along the shoreline of Huggins Island to the southeastern most point of Huggins Island, then south to the northeastern most point on Dudley Island, then southwest along the shoreline of Dudley Island to the eastern tip of Bear Island.
- (D) The Masonboro Sound Area (Cape Fear River Basin) including all waters between the Barrier Islands and the mainland from Carolina Beach Inlet to Masonboro Inlet.
- (9) Black and South Rivers ORW Area (Cape Fear River Basin) [Index Nos. 18-68-(0.5), 18-68-(3.5), 18-68-(11.5), 18-68-12-(0.5), 18-68-12-(11.5), and 18-68-2]: the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, will be applied to protect the designated ORW areas:
- (A) Stormwater controls described in Subparagraph (c)(1) of this Rule will apply within one mile and draining to the designated ORW areas;
- (B) New or expanded NPDES permitted wastewater discharges located one mile upstream of the stream segments
- designated ORW (upstream on the designated mainstem and upstream into direct tributaries to the designated mainstem) will comply with the following discharge restrictions:
- (i) Oxygen Consuming Wastes: Effluent limitations will be as follows: BOD = 5 mg/l and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) will be limited to effluent concentrations of 20 mg/l;
 - (iii) Emergency Requirements: Failsafe treatment designs will be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, appropriate effluent limitations will be set for phosphorus or nitrogen, or both.
 - (v) Toxic substances: In cases where complex discharges (those containing or potentially containing toxicants) may be currently present in the discharge, a safety factor will be applied to any chemical or whole effluent toxicity allocation. The limit for a specific chemical constituent will be allocated at one-half of the normal standard at design conditions. Whole effluent toxicity will be allocated to protect for chronic toxicity at an effluent concentration equal to twice that which is acceptable under flow design criteria (pursuant to 15A NCAC 2B .0206).

Statutory Authority G.S. 143-214.1.

SECTION .0300 - ASSIGNMENT OF STREAM CLASSIFICATIONS

.0311 CAPE FEAR RIVER BASIN

- (a) Places where the schedules may be inspected:
- (I) Clerk of Court:

- | | | |
|-------------------|------|--------------------------|
| Alamance County | (8) | August 1, 1985; |
| Bladen County | (9) | December 1, 1985; |
| Brunswick County | (10) | February 1, 1986; |
| Caswell County | (11) | July 1, 1987; |
| Chatham County | (12) | October 1, 1987; |
| Columbus County | (13) | March 1, 1988; |
| Cumberland County | (14) | June 1, 1988; |
| Duplin County | (15) | July 1, 1988; |
| Durham County | (16) | January 1, 1990; |
| Forsyth County | (17) | August 1, 1990; |
| Guilford County | (18) | August 3, 1992; |
| Harnett County | (19) | <u>February 1, 1994.</u> |
- (c) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective June 1, 1988 as follows:
- (1) Cane Creek [Index No. 16-21-(1)] from source to a point 0.5 mile north of N.C. Hwy. 54 (Cane Reservoir Dam) including the Cane Creek Reservoir and all tributaries has been reclassified from Class WS-III to WS-I.
 - (2) Morgan Creek [Index No. 16-41-1-(1)] to the University Lake dam including University Lake and all tributaries has been reclassified from Class WS-III to WS-1.
 - (d) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective July 1, 1988 by the reclassification of Crane Creek (Crains Creek) [Index No. 18-23-16-(1)] from source to mouth of Beaver Creek including all tributaries from C to WS-III.
 - (e) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective January 1, 1990 as follows:
- | | |
|---|---|
| (A) Winston-Salem Regional Office
8025 North Point Boulevard
Suite 100
Winston-Salem, North Carolina | (1) Intracoastal Waterway (Index No. 18-87) from southern edge of White Oak River Basin to western end of Permuta Island (a line from Morris Landing to Atlantic Ocean), from the eastern mouth of Old Topsail Creek to the southwestern shore of Howe Creek and from the southwest mouth of Shinn Creek to channel marker No. 153 including all tributaries except the King Creek Restricted Area, Hardison Creek, Old Topsail Creek, Mill Creek, Futch Creek and Pages Creek were reclassified from Class SA to Class SA ORW. |
| (B) Fayetteville Regional Office
Wachovia Building
Suite 714
Fayetteville, North Carolina | (2) Topsail Sound and Middle Sound ORW Area which includes all waters between |
| (C) Raleigh Regional Office
3800 Barrett Drive
Raleigh, North Carolina | |
| (D) Washington Regional Office
1424 Carolina Avenue
Washington, North Carolina | |
| (E) Wilmington Regional Office
127 Cardinal Drive Extension
Wilmington, North Carolina | |
- (b) The Cape Fear River Basin Schedule of Classification and Water Quality Standards was amended effective:
- (1) March 1, 1977;
 - (2) December 13, 1979;
 - (3) December 14, 1980;
 - (4) August 9, 1981;
 - (5) April 1, 1982;
 - (6) December 1, 1983;
 - (7) January 1, 1985;

- the Barrier Islands and the Intracoastal Waterway located between a line running from the western most shore of Mason Inlet to the southwestern shore of Howe Creek and a line running from the western shore of New Topsail Inlet to the eastern mouth of Old Topsail Creek was reclassified from Class SA to Class SA ORW.
- (3) Masonboro Sound ORW Area which includes all waters between the Barrier Islands and the mainland from a line running from the southwest mouth of Shinn Creek at the Intracoastal Waterway to the southern shore of Masonboro Inlet and a line running from the Intracoastal Waterway Channel marker No. 153 to the southside of the Carolina Beach Inlet was reclassified from Class SA to Class SA ORW.
- (f) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective January 1, 1990 as follows: Big Alamance Creek [Index No. 16-19-(1)] from source to Lake Mackintosh Dam including all tributaries has been reclassified from Class WS-III NSW to Class WS-II NSW.
- (g) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.
- (h) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective December 1, 1993 as follows:
- (1) The Black River from its source to the Cape Fear River [Index Nos. 18-68-(0.5), 18-68-(3.5) and 18-68-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
- (2) The South River from Big Swamp to the Black River [Index Nos. 18-68-12-(0.5) and 18-68-12-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
- (3) Six Runs Creek from Quewhiffle Swamp to the Black River [Index No. 18-68-2] was reclassified from Class C Sw to Class C Sw ORW.
- Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).*
- * * * * *
- Notice*** is hereby given in accordance with G.S. 150B-21.2 that the DEM - Air Quality Section intends to amend rules cited as 15A NCAC 2D .1201 - .1202, .1204, .1206, .1209 and 15A NCAC 2H .0601.
- The proposed effective date of this action is November 1, 1993.***
- The public hearings will be conducted at:***
- July 20, 1993***
7:00 p.m.
Groundfloor Hearing Room
Archdale Building
512 North Salisbury Street
Raleigh, North Carolina
- July 27, 1993***
7:00 p.m.
Charlotte/Mecklenburg Government Center
Conference Chamber
600 East 4th Street
Charlotte, North Carolina
- Reason for Proposed Action: To exempt small incinerators used by farmers to dispose of dead animals originating on their farms from the incinerator rules and from needing a permit. To define crematory incinerator as a new category with a minimum temperature of 1600° F.***
- Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Any person desiring to comment for more than three minutes is requested to submit a written statement for inclusion in the record of proceed-***

ings at the public hearing. The hearing record will remain open until August 27, 1993 to receive additional written statements. Comments should be sent to and additional information concerning the hearing or the proposals may be obtained by contacting: Mr. Thomas C. Allen, Division of Environmental Management, P. O. Box 29535, Raleigh, North Carolina 27626-0535, (919) 733-1489.

CHAPTER 2 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 2D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .1200 - CONTROL OF EMISSIONS FROM INCINERATORS

.1201 PURPOSE AND SCOPE

(a) This Section sets forth rules for the control of the emissions of air pollutants from incinerators.

(b) The rules in this Section apply to all types of incinerators as defined by 15A NCAC 2D .0101(19), including incinerators with heat recovery and industrial incinerators. The rules in this Section do not apply to afterburners, flares, fume incinerators, and other similar devices used to reduce the emissions of air pollutants from processes, whose emissions shall be regulated as process emissions.

(c) This Section does not apply to any boilers or industrial furnaces that burn waste as a fuel.

(d) This Section does not apply to incinerators used to dispose of dead animals or poultry that meet the following requirements:

- (1) The incinerator is owned and operated by a farmer;
- (2) The incinerator is used solely to dispose of animals or poultry originating on the farm where the incinerator is located;
- (3) The incinerator has a design capacity of no more than 150 pounds per hour, and the incinerator is not charged at a rate that exceeds its design capacity; and
- (4) The incinerator complies with Rule .0521 (visible emissions) and .0522 (odorous emissions) of this Subchapter.

(e) If the emissions of all toxic air pollutants from an incinerator and associated waste handling and storage are less than the levels listed in 15A NCAC 2H .0610(h), the incinerator shall be exempt from Rules .1205(f) through (j), and .1206 of this Section.

(f) (d) If an incinerator can be defined as being

more than one type of incinerator, then the following order shall be used to determine the standards and requirements to apply: hazardous waste incinerators, sludge incinerators, medical waste incinerators, municipal solid waste incinerators, crematory incinerators, and other incinerators.

Statutory Authority G.S. 143-215.3(a)(1).

.1202 DEFINITIONS

(a) For the purposes of this Section, the following definitions apply:

- (1) "Crematory incinerator" means any incinerator located at a crematory regulated under 21 NCAC 34C that is used solely for the cremation of human remains.
- (2) (d) "Construction and demolition waste" means wood, paper, and other combustible waste resulting from construction and demolition projects except for hazardous waste and asphaltic material.
- (3) (e) "Hazardous waste incinerator" means an incinerator regulated under 15A NCAC 13A .0001 through .0014, 40 CFR 264.340 to 264.351, Subpart O, or 265.340 to 265.352, Subpart O.
- (4) (f) "Medical waste incinerator" means any incinerator regulated under Section 15A NCAC 13B .1207(3).
- (5) (g) "Municipal solid waste incinerator" means an incinerator as defined at 40 CFR 60.51a that burns municipal-type solid waste of which at least 95 percent by weight is generated off-site and that has a capacity of at least one ton per hour, except that boilers shall not be considered part of this definition.
- (6) (h) "Municipal-type solid waste" means solid waste defined at 40 CFR 60.51a.
- (7) (i) "Sludge incinerator" means any incinerator regulated under Paragraph (a)(4) of Rule .0525 of this Subchapter.

(b) The version of the Code of Federal Regulations adopted by reference incorporated in this Rule is that of February 15, 1991, and does not include any subsequent amendments or editions to the referenced material in accordance with G.S. 150B-14(b).

Statutory Authority G.S. 143-213; 143-215.3(a)(1).

.1204 REPORTING AND RECORDKEEPING

(a) The reporting and recordkeeping requirements of Rule .1105 of this Subchapter shall apply to all incinerators in addition to any reporting and recordkeeping requirements that may be contained in any other rules.

(b) The owner or operator of an incinerator shall maintain and operate a continuous temperature measuring and recording device for the primary chamber and, where there is a secondary chamber, for the secondary chamber. The owner or operator of an incinerator that has installed air pollution abatement equipment to reduce emissions of hydrogen chloride shall install, operate, and maintain continuous monitoring equipment to measure pH for wet scrubber systems and rate of alkaline injection for dry scrubber systems. The Director shall require the owner or operator of an incinerator with a permitted charge rate of 750 pounds per hour or more to install, operate, and maintain continuous monitors for oxygen or for carbon monoxide or both as he deems appropriate. The Director may require the owner or operator of an incinerator with a permitted charge rate of less than 750 pounds per hour to install, operate, and maintain monitors for oxygen or for carbon monoxide or both as he deems appropriate.

(c) All monitoring devices and systems required by this Rule shall be subject to a quality assurance program approved by the Director. Such quality assurance program shall include procedures and frequencies for calibration, standards traceability, operational checks, maintenance, auditing, data validation, and a schedule for implementing the quality assurance program.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4),(5).

.1206 OPERATIONAL STANDARDS

(a) The operational standards in this Rule do not apply to incinerators where operational standards in Rule .0524 or .0525 of this Subchapter apply.

(b) Hazardous waste incinerators. Hazardous waste incinerators shall comply with Rules 15A NCAC 13A .0001 through .0014, which are administered and enforced by the Division of Solid Waste Management.

(c) Medical waste incinerators. Medical waste incinerators shall meet the following requirements:

- (1) The primary chamber temperature shall be at least 1200° F.
- (2) The secondary chamber temperature shall be at least 1800° F.
- (3) Gases generated by the combustion shall be subjected to a minimum tem-

perature of 1800° F for a period of not less than one second.

Medical waste incinerators shall comply with 15A NCAC 13B .1207(3) and any other pertinent parts of Section 15A NCAC 13B .1200, which are administered and enforced by the Division of Solid Waste Management.

(d) Municipal solid waste incinerators. Municipal solid waste incinerators shall meet the following requirements:

- (1) The concentration of carbon monoxide at the combustor outlet shall not exceed the concentration in Table 1 of Paragraph (a) of 40 CFR 60.36a. The incinerator technology named in this table is defined under 40 CFR 60.51a.
- (2) The temperature of the exhaust gas entering the particulate matter control device shall not exceed 450° F.
- (3) Gases generated by the combustion shall be subjected to a minimum temperature of 1800° F for a period of not less than one second.

(e) Sludge incinerators. The combustion temperature in a sludge incinerator shall not be greater than 1650° F or less than 1200° F. The maximum oxygen content of the exit gas from a sludge incinerator stack shall be:

- (1) 12 percent (dry basis) for a multiple hearth sewage sludge incinerator,
- (2) seven percent (dry basis) for a fluidized bed sewage sludge incinerator,
- (3) nine percent (dry basis) for an electric sewage sludge incinerator, and
- (4) 12 percent (dry basis) for a rotary kiln sewage sludge incinerator.

(f) Crematory incinerators. Gases generated by the combustion shall be subjected to a minimum temperature of 1600° F for a period of not less than one second.

(g) ~~(f)~~ Other incinerators. All incinerators not covered under Paragraphs (a) through ~~(e)~~ ~~(f)~~ of this Rule shall meet the following requirement: Gases generated by the combustion shall be subjected to a minimum temperature of 1800° F for a period of not less than one second. The temperature of 1800° F shall be maintained at least 55 minutes out of each 60-minute period, but at no time shall the temperature go below 1600° F.

(h) ~~(g)~~ Except during start-up where the procedure has been approved in accordance with Rule .0535(g) of this Subchapter, waste material shall not be loaded into any incinerators covered under Paragraphs (c), (d), or (f), or (g) when the temperature is below the minimum required temperature.

Start-up procedures may be determined on a case-by-case basis in accordance with Rule .0535(g) of this Subchapter. Incinerators covered under Paragraphs (c), (d), ~~and~~ (f), ~~and~~ (g) shall have automatic auxiliary burners that are capable of maintaining the required minimum temperature in the secondary chamber excluding the heat content of the wastes.

(i) ~~(h)~~ The version of the Code of Federal Regulations ~~adopted by reference~~ incorporated in this Rule is that of February 15, 1991, and does not include any subsequent amendments or additions to the referenced material in accordance with G.S. 150B-14(b).

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5).

.1209 COMPLIANCE SCHEDULES

(a) The owner or operator of an incinerator subject to Paragraphs (f), (g), (h) or (i) of Rule .1205 of this Section or subject to Paragraphs (d) through ~~(f)~~ (g) of Rule .1206 of this Section except medical waste incinerators and hazardous waste incinerators that:

- (1) begins construction after September 30, 1991, shall be in compliance with Rule .1205 of this Section and Paragraphs (d) through ~~(g)~~ (h) of Rule .1206 of this Section before beginning operation.
- (2) begins construction or is in operation before October 1, 1991, shall adhere to the following increments of progress and schedules:
 - (A) Documentation that the incinerator meets the requirements of Paragraphs (f), (g), (h), and (i) of Rule .1205 of this Section and Paragraphs (d) through ~~(g)~~ (h) of Rule .1206 of this Section or an air permit application including final plans and a compliance schedule shall be submitted before:
 - (i) April 1, 1992, for incinerators at plant sites with an incinerator capacity of 1000 pounds per hour or more;
 - (ii) October 1, 1992, for incinerators at plant sites with an incinerator capacity of less than 1000 pounds per hour but 400 pounds per hour or more;
 - (iii) April 1, 1993, for incinerators at plant sites with an incinerator capacity of less than 400 pounds per hour but 200 pounds per hour

or more;

(iv) October 1, 1993, for plant sites with an incinerator capacity of less than 200 pounds per hour.

(B) The compliance schedule shall contain the following increments of progress:

- (i) a date by which contracts for the emission control system ~~and/or~~ or process equipment shall be awarded or orders shall be issued for purchase of component parts;
- (ii) a date by which on-site construction or installation of the emission control ~~and/or~~ or process equipment shall begin;
- (iii) a date by which on-site construction or installation of the emission control ~~and/or~~ or process equipment shall be completed; and
- (iv) a date by which final compliance shall be achieved.

(C) The final compliance date under Paragraph (a)(2)(B) of this Rule shall not be later than:

- (i) April 1, 1994, for incinerators at plant sites with an incinerator capacity of 1000 pounds per hour or more;
- (ii) October 1, 1994, for incinerators at plant sites with an incinerator capacity of less than 1000 pounds per hour but 400 pounds per hour or more;
- (iii) April 1, 1995, for incinerators at plant sites with an incinerator capacity of less than 400 pounds per hour but 200 pounds per hour or more;
- (iv) October 1, 1995, for incinerators at plant sites with an incinerator capacity of less than 200 pounds per hour.

(b) The owner or operator of a medical waste incinerator that:

- (1) begins construction after September 30, 1991, shall be in compliance with Rule .1205 of this Section and Paragraphs ~~(h)~~ (c) and ~~(g)~~ (h) of Rule .1206 of this Section before beginning operation;
- (2) begins construction or is in operation before October 1, 1991, shall adhere to the following increments of progress and schedules:
 - (A) Documentation that the incinerator meets the requirements of Paragraphs

- (f), (g), (h), and (i) of Rule .1205 of this Section and Paragraph (c) of Rule .1206 of this Section or an air permit application including final plans and a compliance schedule shall be submitted following the schedule set ~~out~~ out in Paragraph (a)(2)(A) of this Rule;
- (B) The compliance schedule shall contain the same increments of progress as required by Paragraph (a)(2)(B) of this Rule;
- (C) Final compliance shall be achieved no later than January 1, 1995.
- (c) The owner or operator of a hazardous waste incinerator that:
- (1) begins construction after September 30, 1991, shall be in compliance with Rule .1205 of this Section before beginning operation;
- (2) begins construction or is in operation before October 1, 1991, shall adhere to the following increments of progress and schedules:
- (A) Documentation that the incinerator meets the requirements of Rule .1205 of this Section or documentation that a permit application has been filed with the Division of Solid Waste Management to make necessary modifications to bring the incinerator into compliance with Rule .1205 of this Section and a compliance schedule shall be submitted before April 1, 1992;
- (B) The compliance schedule shall contain the date by which a permit application shall be submitted to the Division of Environmental Management and the increments of progress required by Paragraph (a)(2)(B) of this Rule;
- (C) Final compliance shall be achieved within two years after receipt of a permit from the Division of Solid Waste Management, but before October 1, 1995.
- (d) The owner or operator shall certify to the Director within five days after the deadline, for each increment of progress, whether the required increment of progress has been met.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4),(5).

SUBCHAPTER 2H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .0600 - AIR QUALITY PERMITS

.0601 PURPOSE AND SCOPE

(a) The following sources or activities are not likely to contravene any applicable ambient air quality or emission control standard, and therefore, are not required to obtain a permit:

- (1) air conditioning or comfort ventilation systems which do not transport, remove, or exhaust product or byproduct to the atmosphere;
- (2) combustion sources serving heating systems which provide comfort heat for residences;
- (3) laboratory equipment used for chemical or physical analysis;
- (4) nonstationary internal combustion engines and vehicles;
- (5) equipment which emits only nitrogen, oxygen, carbon dioxide, ~~and/or~~ or water vapor;
- (6) maintenance or repair of existing equipment that does not result in an increase to the emission of air pollutants;
- (7) replacement of existing equipment with like equipment of same size, type, and function that does not result in an increase to the emission of air pollutants and that is described by the current permit, including the application, except for characteristics that could not affect pollution control, for example, serial numbers;
- (8) smudge pots for orchards or small outdoor heating devices to prevent freezing of plants;
- (9) fuel burning equipment firing exclusively gaseous fuel with the total heat input rating of 250 million BTU per hour or less;
- (10) fuel burning equipment firing exclusively No. 1 or No. 2 fuel oil with the total heat input rating of 100 million BTU per hour or less;
- (11) fuel burning equipment firing a mixture of gaseous fuel, No. 1 fuel oil or No. 2 fuel oil, in any proportion, with the total heat input rating of 100 million BTU per hour or less;
- (12) any incinerator covered under Paragraph (d) of 15A NCAC 2D .1201.

(b) The owner or operator of any source required to have a permit may request the Director to exempt the source from having to have a permit. The request shall be in writing. Along with

the request, the owner or operator shall submit supporting documentation to show that air quality and emission control standards will not be, nor are likely to be, contravened. If the documentation shows to the satisfaction of the Director that air quality and emission control standards will not be, nor are likely to be, contravened, a permit shall not be required.

(c) The owner or operator of all sources for which there is an ambient air quality or emission control standard that is not exempted by Paragraph (a) or (b) of this Rule shall apply for a permit. The owner or operator of a source required to have a permit shall not begin constructing or operating the source if it is a new source or modify the source if it is an existing source without first obtaining a permit.

(d) Any person who constructs or modifies a complex source subject to **Section 15A NCAC 2D .0800** shall obtain a permit in accordance with Rules .0602 through .0609 of this Section. If the source is excepted in **Section 15A NCAC 2D .0800**, a permit shall not be required.

(e) Any exemption allowed by Paragraph (a) or (b) of this Rule does not apply to sources subject to **15A NCAC 2D .0524, .0525, or .0530**. The owner or operator of these sources shall obtain a permit before beginning construction or operation.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.108; 143-215.109.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Marine Fisheries Commission intends to amend rules cited as **15A NCAC 3I .0001; 15A NCAC 3J .0401 and 15A NCAC 3R .0011**.

The proposed effective date of this action is October 1, 1993.

The public hearings will be conducted on the following dates and locations. Each hearing will begin at 7:00 P.M. with a public meeting to follow at the conclusion of the public hearing.

July 20, 1993
Carteret Community College
Joslyn Hall
3505 Arendell St.
Morehead City, NC

July 21, 1993
Beaufort County Courthouse
District Court Room
Washington, NC

July 22, 1993
NC Aquarium
Airport Road
Manteo, NC

July 26, 1993
Randolph County Courthouse
Courtroom "C"
145 Worth Street
Asheboro, NC

July 27, 1993
New Hanover County Courthouse
Court Room 302
4th and Princess Street
Wilmington, NC

BUSINESS SESSION:

The Marine Fisheries Commission will conduct a Business Session on August 6th and 7th, 1993, starting at 9:00 A.M. to decide on these proposed rules. This meeting will be conducted in Beaufort, N.C. at Duke University Marine Lab.

Reason for Proposed Action:

15A NCAC 3I .0001 - DEFINITIONS - To define intertidal oyster beds at the request of the Pender County Waterman's Association.

15A NCAC 3J .0401- COMMERCIAL FISHING GEAR - To allow proclamation authority over all fishing gear which would include gear used for recreational purposes as requested by commercial fishermen.

15A NCAC 3R .0011 - PURSE SEINES PROHIBITED - To prohibit the taking of menhaden by purse seines in the Atlantic Ocean off Dare County as requested by the Town of Nags Head.

Comment Procedures: Comments and statements, both written and oral, may be presented at the hearings. Written comments are encouraged and may be submitted to the Marine Fisheries Commission, PO Box 769, Morehead City, NC 28557. These written and oral comments must be received no later than 10:30 a.m., August 2, 1993. Oral presentation lengths may be limited depending on the number of people that wish to speak at the public hearings.

**CHAPTER 3 - MARINE
FISHERIES**

SUBCHAPTER 3I - GENERAL RULES

.0001 DEFINITIONS

(a) All definitions set out in Subchapter IV of Chapter 113 of the General Statutes apply in these Rules.

(b) The following additional terms are hereby defined:

- (1) Commercial Fishing Equipment. All fishing equipment used in coastal fishing waters except:
 - (A) Seines less than 12 feet in length;
 - (B) Spears;
 - (C) A dip net having a handle not more than eight feet in length and a hoop or frame to which the net is attached not exceeding 60 inches along the perimeter;
 - (D) Hook-and-line and bait-and-line equipment other than multiple-hook or multiple-bait trotline;
 - (E) A landing net used to assist in taking fish when the initial and primary method of taking is by the use of hook and line; and
 - (F) Cast Nets.
- (2) Fixed or stationary net. A net anchored or staked to the bottom, or some structure attached to the bottom, at both ends of the net;
- (3) Mesh Length. The diagonal distance from the inside of one knot to the outside of the other knot, when the net is stretched hand-tight;
- (4) Possess. Any actual or constructive holding whether under claim of ownership or not;
- (5) Transport. Ship, carry, or cause to be carried or moved by public or private carrier by land, sea, or air;
- (6) Use. Employ, set, operate, or permit to be operated or employed;
- (7) Purse Gill Nets. Any gill net used to encircle fish when the net is closed by the use of a purse line through rings located along the top or bottom line or elsewhere on such net;
- (8) Gill Net. A net set vertically in the water to capture fish by entanglement by the gills in its mesh as a result of net design, construction, mesh size, webbing diameter or method in which it

is used.

- (9) Seine. A net set vertically in the water and pulled by hand or power to capture fish by encirclement and confining fish within itself or against another net, the shore or bank as a result of net design, construction, mesh size, webbing diameter, or method in which it is used.
- (10) Internal Coastal Waters or Internal Waters. All coastal fishing waters except the Atlantic Ocean;
- (11) Channel Net. A net used to take shrimp which is anchored or attached to the bottom at both ends or with one end anchored or attached to the bottom and the other end attached to a boat;
- (12) Dredge. A device towed by engine power consisting of a frame, tooth bar or smooth bar, and catchbag used in the harvest of oysters, clams, crabs, scallops, or conchs;
- (13) Mechanical methods for clamming. Includes, but not limited to, dredges, hydraulic clam dredges, stick rakes and other rakes when towed by engine power, patent tongs, kicking with propellers and/or or deflector plates with or without trawls, and any other method that utilizes mechanical means to harvest clams;
- (14) Mechanical methods for oystering. Includes, but not limited to, dredges, patent tongs, stick rakes and other rakes when towed by engine power and any other method that utilizes mechanical means to harvest oysters;
- (15) Depuration. Purification or the removal of adulteration from live oysters, clams, and mussels by any natural or artificially controlled means;
- (16) Peeler Crab. A blue crab that has a soft shell developing under a hard shell and having a definite pink, white, or red line or rim on the outer edge of the back fin or flipper;
- (17) Length of finfish. Determined by measuring along a straight line the distance from the tip of the snout with the mouth closed to the tip of the compressed caudal (tail) fin;
- (18) Licensee. Any person holding a valid licensee license from the Department to take or deal in marine fisheries resources.
- (19) Aquaculture operation. An operation

that produces artificially propagated stocks of marine or estuarine resources or obtains such stocks from authorized sources for the purpose of rearing in a controlled environment. A controlled environment provides and maintains throughout the rearing process one or more of the following: predator protection, food, water circulation, salinity, and/or or temperature controls utilizing proven technology not found in the natural environment.

- (20) Critical habitat areas are those fragile estuarine and marine areas that support juvenile and adult populations of economically important seafood species, as well as forage species important in the food chain. Critical habitats include nursery areas, beds of submerged aquatic vegetation, shellfish producing areas, anadromous fish spawning and anadromous fish nursery areas, in all coastal fishing waters as determined through extensive marine and estuarine survey sampling. Critical habitats are vital for portions, or the entire life cycle, including the early growth and development of important seafood species.

- (A) Beds of submerged aquatic vegetation are those habitats in public trust and estuarine waters vegetated with one or more species of submerged vegetation such as eelgrass (*Zostera marina*), shoalgrass (*Halodule wrightii*) and widgeongrass (*Ruppia maritima*). These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed is defined by the presence of above-ground leaves or the below-ground rhizomes and propagules together with the sediment on which the plants grow. In defining beds of submerged aquatic vegetation, the Marine Fisheries Commission recognizes the Aquatic Weed Control Act of 1991 (G.S. 113A-220 et. seq.) and does not intend the submerged aquatic vegetation definition and its implementing rules to apply to or conflict with the non-development control activities authorized by that Act.

(B) Shellfish producing habitats are those areas in which economically important shellfish, such as, but not limited to clams, oysters, scallops, mussels, and whelks, whether historically or currently, reproduce and survive because of such favorable conditions as bottom type, salinity, currents, cover, and cultch. Included are those shellfish producing areas closed to shellfish harvest due to pollution.

- (C) Anadromous fish spawning areas are defined as those areas where evidence of spawning of anadromous fish has been documented by direct observation of spawning, capture of running ripe females, or capture of eggs or early larvae.
- (D) Anadromous fish nursery areas are defined as those areas in the riverine and estuarine systems utilized by post-larval and later juvenile anadromous fish.

- (21) Intertidal Oyster Bed. A formation, regardless of size or shape, formed of shell and live oysters of varying density.

Statutory Authority G.S. 113-134; 143B-289.4.

SUBCHAPTER 3J - NETS, POTS, DREDGES, AND OTHER FISHING DEVICES

SECTION .0400 - FISHING GEAR, ATLANTIC OCEAN

.0401 FISHING GEAR

(a) The Fisheries Director may, by proclamation, close the areas described in Paragraph (b) of this Rule to the use of specific ~~commercial~~ fishing gear.

(b) It is unlawful to use ~~commercial~~ fishing gear as specified by proclamation at the time and dates specified in the proclamation between the Friday before Easter through December 31 in the following areas when such areas have been closed by proclamation:

- (1) All or part of the Atlantic Ocean, up to one-half mile from the beach;
- (2) Up to one-half mile in all directions of Oregon Inlet;
- (3) Up to one-half mile in all directions of Hatteras Inlet;
- (4) Up to one-half mile in all directions of

- Ocracoke Inlet;
- (5) Up to one-half mile of the Cape Lookout Rock Jetty;
- (6) Up to one-half mile in all directions of fishing piers open to the public;
- (7) Up to one-half mile in all directions of State Parks;
- (8) Up to one-half mile of marinas as defined by the Coastal Resources Commission.
- (c) The Fisheries Director shall specify in the proclamation the boundaries of the closure through the use of maps, legal descriptions, prominent landmarks or other permanent type markers.
- (d) The Fisheries Director shall hold a public meeting in the affected area before issuance of proclamations authorized by this Rule.
- (e) This Rule will be in effect until July 1, 1995.

Statutory Authority G.S. 113-133; 113-134; 113-182; 113-221; 143B-289.4.

SUBCHAPTER 3R - DESCRIPTIVE BOUNDARIES

.0011 PURSE SEINES PROHIBITED

(a) It is unlawful to take menhaden or Atlantic thread herring by the use of a purse seine from the Atlantic Ocean within an area bounded by a line extending from Bald Head Lighthouse bearing 242° (M) to Cape Fear River ship channel buoy "7", then bearing 320° (M) to the foot of the Yaupon Beach Fishing Pier on Oak Island, then following the shoreline eastward to a point near Fort Caswell (33° 53' 13" N - 78° 01' 11" W), then running 138° (M) to the Bald Head Lighthouse.

(b) It is unlawful to take menhaden or Atlantic thread herring by the use of a purse seine from the Atlantic Ocean within three miles of the beaches of Dare County.

Statutory Authority G.S. 113-134; 113-182; 143B-289.4.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Coastal Management intends to amend rule cited as 15A NCAC 7H .0304.

The proposed effective date of this action is December 1, 1993.

The public hearing will be conducted at 4:00 p.m. on August 3, 1993 at the Brunswick Co. Government Complex, Public Assembly Building, Bolivia, NC.

Reason for Proposed Action: To amend the Cape Fear Hazard AEC and to more clearly identify the reference maps used by the Commission for establishing all of the Inlet Hazard AECs.

Comment Procedures: All persons interested in this matter are invited to attend the public hearing. The Coastal Resources Commission will receive mailed written comments postmarked no later than Aug. 13, 1993. Any person desiring to present lengthy comments is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. Additional information concerning the hearing or the proposals may be obtained by contacting Dedra Blackwell, Division of Coastal Management, PO Box 27687, Raleigh, NC 27611-7687, (919) 733-2293.

CHAPTER 7 - COASTAL MANAGEMENT

SUBCHAPTER 7H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0300 - OCEAN HAZARD AREAS

.0304 AECs WITHIN OCEAN HAZARD AREAS

The ocean hazard system of AECs contains all of the following areas:

- (1) Ocean Erodible Area. This is the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The seaward boundary of this area is the mean low water line. The landward extent of this area is determined as follows:
- (a) a distance landward from the first line of stable natural vegetation to the recession line that would be established by multiplying the long-term annual erosion rate times 60, provided

- that, where there has been no long-term erosion or the rate is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates shall be those set forth in tables entitled "Long Term Annual Erosion Rates updated through 1986" and approved by the Coastal Resources Commission on July 29, 1988 (except as such rates may be varied in individual contested cases, declaratory or interpretive rulings). The tables are available without cost from any local permit officer or the Division of Coastal Management; and
- (b) a distance landward from the recession line established in Subparagraph (a) of this Paragraph Sub-Item (1)(a) of this Rule to the recession line that would be generated by a storm having a one percent chance of being equalled or exceeded in any given year.
- (2) The High Hazard Flood Area. This is the area subject to high velocity waters (including, but not limited to, hurricane wave wash) in a storm having a one percent chance of being equalled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development. In the absence of these rate maps, other available base flood elevation data prepared by a federal, state, or other source may be used, provided said data source is approved by the CRC.
- (3) Inlet Hazard Area. The inlet hazard areas are natural-hazard areas that are especially vulnerable to erosion, flooding and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. This area shall extend landward from the mean low water line a distance sufficient to encompass that area within which the inlet will, based on statistical analysis, migrate, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet (such as an unusually narrow barrier island, an unusually long channel feeding the inlet, or an overwash area), and external influences such as jetties and channelization. ~~These areas shall be identified on inlet hazard area maps approved by the Coastal Resources Commission. The areas identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, by Loie J. Priddy and Rick Carraway are hereby designated as Inlet Hazard Areas except that the Cape Fear Inlet Hazard as shown on said map shall not extend northeast of the Baldhead Island marina entrance channel.~~ In all cases, this area shall be an extension of the adjacent ocean erodible area and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area.
- (4) Unvegetated Beach Area. This is a dynamic area that is subject to rapid unpredictable landform change from wind and wave action. The areas in this category shall be designated following detailed studies by the Coastal Resources Commission. These areas shall be designated on maps approved by the Commission and available without cost from any local permit officer or the Division of Coastal Management.

Statutory Authority G.S. 113A-107; 113A-113; 113A-124.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rules cited as 15A NCAC 13A .0001, .0009 and adopt rule cited as 15A NCAC 13A .0018.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on July 23, 1993 at the Highway Building,

*First Floor Auditorium, 1 South Wilmington Street,
Raleigh, North Carolina.*

Reason for Proposed Action: *To establish rules in accordance with federal rules which were promulgated between July 10, 1992 and February 16, 1993, primarily standards for the management of used oil which are required for North Carolina to remain in compliance with EPA authorization requirements.*

Comment Procedures: *All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.*

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE COMMISSION FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 13 - SOLID WASTE MANAGEMENT

SUBCHAPTER 13A - HAZARDOUS WASTE MANAGEMENT

.0001 GENERAL

(a) The Hazardous Waste Section of the Solid Waste Management Division shall administer the hazardous waste management program for the State of North Carolina.

(b) In applying the federal requirements incorporated by reference throughout this Subchapter, the following substitutions or exceptions shall apply:

- (1) "Department of Environment, Health, and Natural Resources" shall be substituted for "Environmental Protection Agency" except in 40 CFR 262.51 through 262.54, 262.56, 262.57 where references to the Environmental Protection Agency shall remain without substitution;
 - (2) "Secretary of the Department of Environment, Health, and Natural Resources" shall be substituted for "Administrator," "Regional Administrator" and "Director" except for 40 CFR 262.55 through 262.57, 264.12(a), 268.5, 268.6, 268.42(b) and 268.44 where the references to the Administrator, Regional Administrator, and Director shall remain without substitution; and
 - (3) An "annual report" shall be required for all hazardous waste generators, treaters, storers, and disposers rather than a "biennial report".
- (c) In the event that there are inconsistencies or duplications in the requirements of those Federal rules incorporated by reference throughout this Subchapter and the State rules set out in this Subchapter, the provisions incorporated by reference shall prevail except where the State rules are more stringent.

(d) 40 CFR 260.1 through 260.3 (Subpart A), "General," have been incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 260.11, "References", has been incorporated by reference including subsequent amendments and editions.

(f) Copies of all materials in this Subchapter may be inspected or obtained as follows:

- (1) Persons interested in receiving rule-making notices concerning the North Carolina Hazardous Waste Management Rules must submit a written request to the Hazardous Waste Section, P.O. Box 27687, Raleigh, N.C. 27611-7687. A check in the amount of fifteen dollars (\$15.00) made payable to The Hazardous Waste Section must be enclosed with each request. Upon receipt of each request, individuals will be placed on a mailing list to receive notices for one year.

- (2) Material incorporated by reference in the Federal Register may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at a cost of ~~three hundred and forty dollars (\$340.00)~~ four hundred and fifteen dollars (\$415.00) per year. Federal Register materials are codified once a year in the Code of Federal Regulations and may be obtained at the above address for a cost of: 40 CFR 1-51 ~~thirty seven dollars (\$37.00)~~ thirty one dollars (\$31.00), 40 CFR 260-299 ~~forty dollars (\$40.00)~~ thirty six dollars (\$36.00) and 40 CFR 100-149 ~~forty dollars (\$40.00)~~ thirty four dollars (\$34.00), total ~~one hundred and seventeen dollars (\$117.00)~~ one hundred and one dollars (\$101.00).
- (3) The North Carolina Hazardous Waste Management Rules, including the incorporated by reference materials, may be obtained from the Hazardous Waste Section at a cost of sixteen dollars (\$16.00).
- (4) All material is available for inspection at the Department of Environment, Health, and Natural Resources, Hazardous Waste Section, 401 Oberlin Road, Raleigh, N.C.

Statutory Authority G.S. 130A-294(c); 150B-21.6.

**.0009 STANDARDS FOR OWNERS/
OPERATORS OF HWTSD
FACILITIES - PART 264**

- (a) Any person who treats, stores or disposes of hazardous waste shall comply with the requirements set forth in this Section. The treatment, storage or disposal of hazardous waste is prohibited except as provided in this Section.
- (b) 40 CFR 264.1 through 264.4 (Subpart A), "General", have been incorporated by reference including subsequent amendments and editions.
- (c) 40 CFR 264.10 through 264.19 (Subpart B), "General Facility Standards", have been incorporated by reference including subsequent amendments and editions.
- (d) 40 CFR 264.30 through 264.37 (Subpart C), "Preparedness and Prevention", have been incorporated by reference including subsequent amendments and editions.
- (e) 40 CFR 264.50 through 264.56 (Subpart D), "Contingency Plan and Emergency Procedures",

have been incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 264.70 through 264.77 (Subpart E), "Manifest System, Recordkeeping, and Reporting", have been incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 264.90 through 264.101 (Subpart F), "Releases From Solid Waste Management Units", have been incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 264.90(a)(2).

(h) 40 CFR 264.110 through 264.120 (Subpart G), "Closure and Post-Closure", have been incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 264.140 through 264.151 (Subpart H), "Financial Requirements", have been incorporated by reference including subsequent amendments and editions, except that 40 CFR 264.143(a)(3), (a)(4), (a)(5), (a)(6), 40 CFR 264.145(a)(3), (a)(4), (a)(5), and 40 CFR 264.151(a)(1), Section 15 are not incorporated by reference.

- (1) The following shall be substituted for the provisions of 40 CFR 264.143(a)(3) which were not incorporated by reference:

The owner or operator shall deposit the full amount of the closure cost estimate at the time the fund is established. Within 1 year of the effective date of these Rules, an owner or operator using a closure trust fund established prior to the effective date of these Rules shall deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or shall obtain other financial assurance as specified in this Section.

- (2) The following shall be substituted for the provisions of 40 CFR 264.143(a)(6) which were not incorporated by reference:

After the trust fund is established, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator within

60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

- (3) The following shall be substituted for the provisions of 40 CFR 264.145(a)(3) which were not incorporated by reference:

- (A) Except as otherwise provided in Paragraph (i)(3)(B) of this Section, the owner or operator shall deposit the full amount of the post-closure cost estimate at the time the fund is established.
- (B) If the Department finds that the owner or operator of an inactive hazardous waste disposal unit cannot provide financial assurance for post-closure through any other option (e.g. surety bond, letter of credit, or corporate guarantee), a plan for annual payments to the trust fund over the term of the RCRA post-closure permit may be established by the Department as a permit condition.

- (4) The following additional requirement shall apply:

The trustee shall notify the Department of payment to the trust fund, by certified mail within ten days following said payment to the trust fund. The notice shall contain the name of the Grantor, the date of payment, the amount of payment, and the current value of the trust fund.

(j) 40 CFR 264.170 through 264.178 (Subpart I), "Use and Management of Containers", have been incorporated by reference including subsequent amendments and editions.

(k) 40 CFR 264.190 through 264.199 (Subpart J), "Tank Systems", have been incorporated by reference including subsequent amendments and editions.

(l) The following are requirements for Surface Impoundments:

- (1) 40 CFR 264.220 through 264.231 (Subpart K), "Surface Impoundments", have been incorporated by reference including subsequent amendments and editions.
- (2) The following are additional standards

for surface impoundments:

- (A) The liner system shall consist of at least two liners;
- (B) Artificial liners shall be equal to or greater than 30 mils in thickness;
- (C) Clayey liners shall be equal to or greater than five feet in thickness and have a maximum permeability of 1.0×10^{-7} cm/sec;
- (D) Clayey liner soils shall have the same characteristics as described in (r)(4)(B)(ii), (iii), (iv), (vi) and (vii) of this Rule;
- (E) A leachate collection system shall be constructed between the upper liner and the bottom liner;
- (F) A leachate detection system shall be constructed below the bottom liner; and
- (G) Surface impoundments shall be constructed in such a manner to prevent landsliding, slippage or slumping.

(m) 40 CFR 264.250 through 264.259 (Subpart L), "Waste Piles", have been incorporated by reference including subsequent amendments and editions.

(n) 40 CFR 264.270 through 264.283 (Subpart M), "Land Treatment", have been incorporated by reference including subsequent amendments and editions.

(o) 40 CFR 264.300 through 264.317 (Subpart N), "Landfills", have been incorporated by reference including subsequent amendments and editions.

(p) A long-term storage facility shall meet groundwater protection, closure and post-closure, and financial requirements for disposal facilities as specified in Paragraphs (g), (h), and (i) of this Rule.

(q) 40 CFR 264.340 through 264.351 (Subpart O), "Incinerators", have been incorporated by reference including subsequent amendments and editions.

(r) The following are additional location standards for facilities:

- (1) In addition to the location standards set forth in 15A NCAC 13A .0009(c), the Department, in determining whether to issue a permit for a hazardous waste management facility, shall consider the risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural

- resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers and shall consider whether provision has been made for adequate buffer zones. The Department shall also consider ground water travel time, soil pH, soil cation exchange capacity, soil composition and permeability, slope, climate, local land use, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility; potential impact on air quality, existence of seismic activity and cavernous bedrock.
- (2) The following minimum separation distances shall be required of all hazardous waste management facilities except that existing facilities shall be required to meet these minimum separation distances to the maximum extent feasible:
- (A) All hazardous waste management facilities shall be located at least 0.25 miles from institutions including but not limited to schools, health care facilities and prisons, unless the owner or operator can demonstrate that no unreasonable risks shall be posed by the proximity of the facility.
 - (B) All hazardous waste treatment and storage facilities shall comply with the following separation distances: all hazardous waste shall be treated and stored a minimum of 50 feet from the property line of the facility; except that all hazardous waste with ignitable, incompatible or reactive characteristics shall be treated and stored a minimum of 200 feet from the property line of the facility if the area adjacent to the facility is zoned for any use other than industrial or is not zoned.
 - (C) All hazardous waste landfills, long-term storage facilities, land treatment facilities and surface impoundments, shall comply with the following separation distances:
 - (i) All hazardous waste shall be located a minimum of 200 feet from the property line of the facility;
 - (ii) facility; Each hazardous waste landfill, long-term storage or surface impoundment facility shall be constructed so that the bottom of the facility is 10 feet or more above the historical high ground water level. The historical high ground water level shall be determined by measuring the seasonal high ground water levels and predicting the long-term maximum high ground water level from published data on similar North Carolina topographic positions, elevations, geology, and climate; and
 - (iii) All hazardous waste shall be located a minimum of 1,000 feet from the zone of influence of any existing off-site ground water well used for drinking water, and outside the zone of influence of any existing or planned on-site drinking water well.
 - (D) Hazardous waste storage and treatment facilities for liquid waste that is classified as TC toxic, toxic, or acutely toxic and is stored or treated in tanks or containers shall not be located:
 - (i) in the recharge area of an aquifer which is designated as an existing sole drinking water source as defined in the Safe Drinking Water Act, Section .1424(e) [42 U.S.C. 300h-3(e)] unless an adequate secondary containment system is constructed, and after consideration of applicable factors in (r)(3) of this Rule, the owner or operator can demonstrate no unreasonable risk to public health;
 - (ii) within 200 feet of surface water impoundments or surface water stream with continuous flow as defined by the United States Geological Survey;
 - (iii) in an area that will allow direct surface or subsurface discharge to WS-I, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;
 - (iv) in an area that will allow direct

- surface or subsurface discharge to the watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;
- (v) within 200 feet horizontally of a 100-year floodplain elevation;
- (vi) within 200 feet of a seismically active area as defined in (c) of this Rule; and
- (vii) within 200 feet of a mine, cave, or cavernous bedrock.
- (3) The Department may require any hazardous waste management facility to comply with greater separation distances or other protective measures necessary to avoid unreasonable risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers or to provide an adequate buffer zone. The Department may also require protective measures necessary to avoid unreasonable risks posed by the soil pH, soil cation exchange capacity, soil composition and permeability, climate, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility, potential impact on air quality, and the existence of seismic activity and cavernous bedrock. In determining whether to require greater separation distances or other protective measures, the Department shall consider the following factors:
- (A) All proposed hazardous waste activities and procedures to be associated with the transfer, storage, treatment or disposal of hazardous waste at the facility;
- (B) The type of hazardous waste to be treated, stored, or disposed of at the facility;
- (C) The volume of waste to be treated, stored, or disposed of at the facility;
- (D) Land use issues including the number of permanent residents in proximity to the facility and their distance from the facility;
- (E) The adequacy of facility design and plans for containment and control of sudden and non-sudden accidental events in combination with adequate off-site evacuation of potentially adversely impacted populations;
- (F) Other land use issues including the number of institutional and commercial structures such as airports and schools in proximity to the facility, their distance from the facility, and the particular nature of the activities that take place in those structures;
- (G) The lateral distance and slope from the facility to surface water supplies or to watersheds draining directly into surface water supplies;
- (H) The vertical distance, and type of soils and geologic conditions separating the facility from the water table;
- (I) The direction and rate of flow of ground water from the sites and the extent and reliability of on-site and nearby data concerning seasonal and long-term groundwater level fluctuations;
- (J) Potential air emissions including rate, direction of movement, dispersion and exposure, whether from planned or accidental, uncontrolled releases; and
- (K) Any other relevant factors.
- (4) The following are additional location standards for landfills, long-term storage facilities and hazardous waste surface impoundments:
- (A) A hazardous waste landfill, long-term storage, or a surface impoundment facility shall not be located:
- (i) In the recharge area of an aquifer which is an existing sole drinking water source;
- (ii) Within 200 feet of a surface water stream with continuous flow as defined by the United States Geological Survey;
- (iii) In an area that will allow direct surface or subsurface discharge to WS-1, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;
- (iv) In an area that will allow direct

- surface or subsurface discharge to a watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;
- (v) Within 200 feet horizontally of a 100-year flood hazard elevation;
- (vi) Within 200 feet of a seismically active area as defined in (c) of this Rule; and
- (vii) Within 200 feet of a mine, cave or cavernous bedrock.
- (B) A hazardous waste landfill or long-term storage facility shall be located in highly weathered, relatively impermeable clayey formations with the following soil characteristics:
- (i) The depth of the unconsolidated soil materials shall be equal to or greater than 20 feet;
- (ii) The percentage of fine-grained soil material shall be equal to or greater than 30 percent passing through a number 200 sieve;
- (iii) Soil liquid limit shall be equal to or greater than 30;
- (iv) Soil plasticity index shall be equal to or greater than 15;
- (v) Soil compacted hydraulic conductivity shall be a maximum of 1.0×10^{-7} cm/sec;
- (vi) Soil Cation Exchange Capacity shall be equal to or greater than 5 milliequivalents per 100 grams;
- (vii) Soil Potential Volume Change Index shall be equal to or less than 4; and
- (viii) Soils shall be underlain by a competent geologic formation having a rock quality designation equal to or greater than 75 percent unless other geological conditions afford adequate protection of public health and the environment.
- (C) A hazardous waste landfill or long-term storage facility shall be located in areas of low to moderate relief to the extent necessary to prevent landsliding or slippage and slumping. The site may be graded to comply with this standard.
- (5) All new hazardous waste impoundments that close with hazardous waste residues left in place shall comply with the standards for hazardous waste landfills
- (6) in (r)(4) of this Rule unless the applicant can demonstrate that equivalent protection of public health and environment is afforded by some other standard.
- (7) The owners and operators of all new hazardous waste management facilities shall construct and maintain a minimum of two observation wells, one upgradient and one downgradient of the proposed facility; and shall establish background groundwater concentrations and monitor annually for all hazardous wastes that the owner or operator proposes to store, treat, or dispose at the facility.
- (A) The owners and operators of all new hazardous waste facilities shall demonstrate that the community has had an opportunity to participate in the siting process by complying with the following:
- The owners and operators shall hold at least one public meeting in the county in which the facility is to be located to inform the community of all hazardous waste management activities including but not limited to: the hazardous properties of the waste to be managed; the type of management proposed for the wastes; the mass and volume of the wastes; and the source of the wastes; and to allow the community to identify specific health, safety and environmental concerns or problems expressed by the community related to the hazardous waste activities associated with the facility. The owners and operators shall provide a public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting. The written transcript and other written material submitted or used at the meeting shall be submitted to the local public library

- closest to and in the county of the proposed site with a request that the information be made available to the public.
- (B) For the purposes of this Rule, public notice shall include: notification of the boards of county commissioners of the county where the proposed site is to be located and all contiguous counties in North Carolina; a legal advertisement placed in a newspaper or newspapers serving those counties; and provision of a news release to at least one newspaper, one radio station, and one TV station serving these counties. Public notice shall include the time, place, and purpose of the meetings required by this Rule.
- (C) No less than 30 days after the first public meeting transcript is available at the local public library, the owners and operators shall hold at least one additional public meeting in order to attempt to resolve community concerns. The owners and operators shall provide public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting.
- (D) The application, written transcripts of all public meetings and any additional material submitted or used at the meetings, and any additions or corrections to the application, including any responses to notices of deficiencies shall be submitted to the local library closest to and in the county of the proposed site, with a request that the information be made available to the public until the permit decision is made.
- (E) The Department shall consider unresolved community concerns in the permit review process and impose final permit conditions based on sound scientific, health, safety, and environmental principles as authorized by applicable laws or rules.
- (s) 40 CFR 264.552 through 264.553 (Subpart S), "Corrective Action for Solid Waste Management Units", have been incorporated by reference including subsequent amendments and editions.
- (t) ~~(s)~~ 40 CFR 264.570 through 264.575 (Subpart W), "Drip Pads", have been incorporated by reference including subsequent amendments and editions.
- (u) ~~(t)~~ 40 CFR 264.600 through 264.603 (Subpart X), "Miscellaneous Units", have been incorporated by reference including subsequent amendments and editions.
- (v) ~~(u)~~ 40 CFR 264.1030 through 264.1049 (Subpart AA), "Air Emission Standards for Process Vents", have been incorporated by reference including subsequent amendments and editions.
- (w) ~~(v)~~ 40 CFR 264.1050 through 264.1079 (Subpart BB), "Air Emission Standards for Equipment Leaks", have been incorporated by reference including subsequent amendments and editions.
- (x) ~~(w)~~ 40 CFR 264.1100 through 264.1102 (Subpart DD), "Containment Buildings", have been incorporated by reference including subsequent amendments and editions.
- (y) ~~(x)~~ Appendices to 40 CFR Part 264 have been incorporated by reference including subsequent amendments and editions.

Statutory Authority G.S. 130A-294(c); 150B-21.6.

.0018 STANDARDS FOR THE MANAGEMENT OF USED OIL

(a) 40 CFR 279.1 (Subpart A), "Definitions", has been incorporated by reference including subsequent amendments and editions, except that the Definition for "Used Oil" is defined by G.S. 130A-290(b) and is not incorporated by reference.

(b) 40 CFR 279.10 through 279.12 (Subpart B), "Applicability", have been incorporated by reference including subsequent amendments and editions.

(c) 40 CFR 279.20 through 279.24 (Subpart C), "Standards for Used Oil Generators", have been incorporated by reference including subsequent amendments and editions.

(d) 40 CFR 279.30 through 279.32 (Subpart D), "Standards for Used Oil Collection Centers and Aggregation Points", have been incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 279.40 through 279.47 (Subpart E),

"Standards for Used Oil Transporter and Transfer Facilities", have been incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 279.50 through 279.59 (Subpart F), "Standards for Used Oil Processors and Re-Refiners", have been incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 279.60 through 279.67 (Subpart G), "Standards for Used Oil Burners Who Burn Off-Specification Used Oil for Energy Recovery", have been incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 279.70 through 279.75 (Subpart H), "Standards for Used Oil Fuel Marketers", have been incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 279.80 through 279.81 of (Subpart I), "Standards for Use as a Dust Suppressant and Disposal of Used Oil" have been incorporated by reference including subsequent amendments and editions. {Note: 40 CFR 279.82, which addresses used oil as a dust suppressant, is specifically not incorporated by reference. See also G.S.130A-309.15 for prohibited acts regarding used oil}.

(j) Additional State Requirements.

(1) By July 1 of each year the following persons shall notify the Department by submitting an annual report listing the type and quantity of used oil transported, collected, and recycled during the preceding calendar year, on Department forms:

- (A) Persons transporting more than 500 gallons of used oil per week over public highways.
- (B) Collection facilities that annually receive more than 6,000 gallons of used oil excluding the volume of used oil collected from individuals that change their own personal motor oil.
- (C) Facilities that annually recycle more than 10,000 gallons of used oil.
- (D) Public used oil collection centers.

(2) The following persons are not required to comply with 15A NCAC 13A .0018(j)(1):

- (A) An electric utility that generates used oil which is reclaimed, recycled, or re-refined on-site for use in its operations.
- (B) An on-site burner that burns its own on-specification used oil provided that the facility is in compliance with any Air Quality permit requirements established by the Department.

(3) An annual fee of twenty five dollars (\$25.00) shall be paid by all persons identified in 15A NCAC 13A .0018(j)(1)(a)-(c) by July 1 of each year.

Statutory Authority G.S. 130A-294(b),(c); 150B-21.6.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 18A .1022, .1323, .1522, .1620, .2218, .2609, .2807 and .3006.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on July 23, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: To bring the rules in conformance with U.S. Food and Drug Administration Policies.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR

AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE COMMISSION FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 18 - ENVIRONMENTAL HEALTH

SUBCHAPTER 18A - SANITATION

SECTION .1000 - SANITATION OF SUMMER CAMPS

.1022 FOOD PROTECTION

(a) All food while being stored, prepared, displayed, and served shall be protected from contamination. All perishable foods shall be stored at such temperatures as will protect against spoilage. All potentially hazardous food shall be maintained at safe temperatures (45° F. or below, or 140° F. or above) except during necessary periods of preparation and serving. Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C). Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility, except that food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C).

(b) Raw fruits and vegetables shall be washed thoroughly before use. Stuffings, poultry, stuffed meats and poultry, and pork and pork products shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish, or eggs, and other potentially hazardous prepared foods shall be prepared, preferably from chilled products, with a minimum of manual contact, and on surfaces and with utensils which are clean and which, prior to use, have been sanitized. Individual portions of food once served to a person shall not be served again.

(c) Conveniently located refrigeration facilities, hot food storage and display facilities, and effective insulated facilities, shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation, display, and serving. Each cold-storage facility used for the storage of perishable food in a

non-frozen state shall be provided with an indicating thermometer of such type and so situated that the thermometer can be easily read.

(d) Containers of food shall be stored above the floor, on clean racks, dollies, slatted shelves, or other clean surfaces in such a manner as to be protected from splash and other contamination.

Statutory Authority G.S. 130A-248.

SECTION .1300 - SANITATION OF HOSPITALS: NURSING AND REST HOMES: SANITARIUMS: SANATORIUMS: EDUCATIONAL AND OTHER INSTITUTIONS

.1323 FOOD PROTECTION

(a) All food while being stored, prepared, displayed, served, and during transportation between kitchen, diet kitchen, or patients' rooms, shall be protected from contamination. All perishable foods shall be stored at such temperatures as will protect against spoilage. All potentially hazardous food shall be maintained at safe temperatures (45° F. or below, or 140° F. or above) except during necessary periods of preparation and serving. Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C). Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility, except that food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C). Raw fruits and vegetables shall be washed thoroughly before use. Stuffings, poultry, stuffed meats and poultry, and pork and pork products shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish or eggs, and other potentially hazardous prepared foods shall be prepared, preferably from chilled products, with a minimum of manual contact, and on surfaces and with utensils which are clean and which, prior to use, have been sanitized. Individual portions of food once served to a person shall not be served again. No live animals or fowl shall be allowed in any room in which food or drink is prepared or stored or in central dining rooms.

(b) Conveniently located refrigeration facilities, hot food storage and display facilities, and effective insulated facilities, shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation,

display, service, and transportation. Each cold-storage facility used for the storage of perishable food in non-frozen state shall be provided with an indicating thermometer of such type and so situated that the thermometer can be easily read.

(c) Containers of food shall be stored above the floor, on clean racks, dollies, slatted shelves, or other clean surfaces in such a manner as to be protected from splash and other contamination.

Statutory Authority G.S. 130A-235.

SECTION .1500 - SANITATION OF LOCAL CONFINEMENT FACILITIES

.1522 FOOD PROTECTION

(a) All food, while being stored, prepared, served, and during transportation, shall be protected from contamination. All perishable food shall be stored at such temperatures as will protect against spoilage. All potentially hazardous food shall be maintained at safe temperatures (45° F. or below, or 140° F. or above) except during necessary periods of preparation and serving. Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C). Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility, except that food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C). Raw fruits and vegetables shall be washed thoroughly before use. Stuffings, poultry, stuffed meats and poultry, and pork and pork products shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish, or eggs, and other potentially hazardous prepared food shall be prepared, preferably from chilled products, with a minimum of manual contact, and on surfaces and with utensils which are clean and which, prior to use, have been sanitized. Individual portions of food once served shall not be served again.

(b) No live animals or fowl shall be allowed in any room or area in which food is prepared, served, or stored.

(c) Refrigeration facilities, hot food storage facilities, and effective insulated facilities, shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation, and serving.

(d) Each cold-storage facility used for the storage of perishable food in a non-frozen state

shall be provided with an indicating thermometer of such type and so situated that the thermometer can be easily read.

(e) Containers of food shall be stored above the floor, on clean racks, dollies, slatted shelves, or other clean surfaces, in such a manner as to be protected from splash and other contamination.

Statutory Authority G.S. 153A-226.

SECTION .1600 - SANITATION OF RESIDENTIAL CARE FACILITIES

.1620 FOOD PROTECTION

(a) All foods, while being stored, prepared, served, and during transportation, shall be protected from contamination. All perishable foods shall be stored at such temperatures as will protect against spoilage. All potentially hazardous food shall be maintained at safe temperatures (45° F. or below, or 140° F. or above) except during necessary periods of preparation and serving. Frozen food shall be kept at such temperatures as to remain frozen, except when being thawed for preparation or use. Potentially hazardous frozen food shall be thawed at refrigerator temperatures of 45° F. or below; or quick-thawed as part of the cooking process; or by a method approved by the sanitarian. An indicating thermometer shall be located in each refrigerator. Raw fruits and vegetables shall be washed thoroughly before use. Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C). Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility, except that food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C). Stuffings, poultry, stuffed meats and poultry, and pork and pork products, shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish, or eggs, and other potentially hazardous prepared food shall be prepared, preferably from chilled products, with a minimum of manual contact, and on surfaces and with utensils which are clean. Portions of food once served to an individual shall not be served again.

(b) Live pets shall not be allowed in any room or area in which food is prepared or stored. Live pets, unless caged and restricted from the immediate eating area, shall not be allowed in any room or area in which food is served.

(c) Refrigeration facilities, hot food storage facilities, and effective insulated facilities, shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation, and serving.

(d) Containers of food shall be stored above the floor, on clean racks, shelves, or other clean surfaces, in such a manner as to be protected from splash and other contamination.

Statutory Authority G.S. 130A-235.

SECTION .2200 - SANITATION OF BED AND BREAKFAST HOMES

.2218 FOOD PROTECTION

(a) Foods shall be protected from contamination while being stored, prepared, served, and during transportation. Perishable foods shall be stored at such temperatures as will protect against spoilage. Potentially hazardous food shall be maintained at safe temperatures (45° F. or below, or 140° F. or above) except during necessary periods of preparation and serving. Frozen food shall be kept at such temperatures as to remain frozen, except when being thawed for preparation or use. Potentially hazardous frozen food shall be thawed at refrigerator temperatures of 45° F. or below; or quick-thawed as part of the cooking process; or by a method approved by the sanitarian. An indicating thermometer shall be located in each refrigerator. Raw fruits and vegetables shall be washed thoroughly before use. Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C). Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility, except that food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C). Stuffings, poultry, stuffed meats and poultry, and pork and pork products shall be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish, or eggs, and other potentially hazardous prepared food, shall be prepared, preferably from chilled products, with a minimum of manual contact. Portions of food once served to an individual shall not be served again.

(b) Live pets shall not be allowed in any room or area in which food is prepared or stored. Live pets, unless caged and restricted from the immediate eating area, shall not be allowed in any room or area in which food is served.

(c) Refrigeration facilities, hot food storage facilities, and effective insulated facilities shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation, and serving.

(d) Containers of food shall be stored above the floor, on clean racks, shelves, or other clean surfaces, in such a manner as to be protected from splash and other contamination.

Statutory Authority G.S. 130A-250.

SECTION .2600 - SANITATION OF RESTAURANTS AND OTHER FOODHANDLING ESTABLISHMENTS

.2609 REFRIGERATION: THAWING: AND PREPARATION OF FOOD

(a) All potentially hazardous foods requiring refrigeration shall be kept at or below 45° F (7° C), except when being prepared or served. An air temperature thermometer accurate to $\pm 3^{\circ}$ F ($\pm 1.5^{\circ}$ C) shall be provided in all refrigerators.

(b) Thawing of potentially hazardous foods shall be done in refrigerated units at a temperature not to exceed 45° F (7° C), or under cold running water no warmer than 70° F (21° C), or as a part of the cooking process.

(c) Employees preparing food shall have used antibacterial soap, dips or hand sanitizers immediately prior to food preparation or shall use clean, plastic disposable gloves or sanitized utensils during food preparation. This requirement is in addition to all handwashing requirements in Section .2600 of these Rules. Food shall be prepared with the least possible manual contact, with suitable utensils and on preparation surfaces that have been cleaned and rinsed prior to use. Preparation surfaces which come in contact with potentially hazardous foods shall be sanitized as provided in Rule .2618(c) of this Section. Raw fruits and raw vegetables shall be thoroughly washed with potable water before being cooked or served.

(d) Potentially hazardous foods requiring cooking shall be cooked to heat all parts of the food to a temperature of at least 140° F (60° C) except as follows:

- (1) poultry, poultry stuffings, stuffed meats, and stuffings containing meat shall be cooked to heat all parts of the food to at least 165° F (74°C) with no interruption of the cooking process, and
- (2) pork and any food containing pork shall be cooked to heat all parts of the food

- (3) to at least 150° F (66° C), and
ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C), and
- (4) (3) rare roast beef shall be cooked to an internal temperature of at least 130° F (54° C), and
- (5) (4) rare beef steak shall be cooked to a temperature of 130° F (54° C) unless otherwise ordered by the immediate consumer.

(e) Liquid, or uncooked frozen, dry eggs and egg products shall be used only for cooking and baking purposes.

(f) Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility. except that, food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C).

(g) All potentially hazardous foods, except rare roast beef, shall be stored at temperatures of 140° F (60° C) or above; or 45° F (7° C) or below except during necessary periods of preparation and serving. Rare roast beef shall be stored at a temperature of at least 130° F (54° C) or above; or 45° F (7° C) or below.

(h) All potentially hazardous food that is transported must be maintained at temperatures as noted in Paragraph (g) of this Rule.

(i) A metal stem-type thermometer accurate to $\pm 2^{\circ}$ F ($\pm 1^{\circ}$ C) shall be available to check food temperatures.

Statutory Authority G.S. 130A-248.

SECTION .2800 - SANITATION OF CHILD DAY CARE FACILITIES

.2807 FOOD PREPARATION

(a) Food shall be prepared with the least possible manual contact, with appropriate utensils, and on surfaces that have been cleaned, rinsed, and sanitized prior to use in order to prevent cross-contamination.

(b) Whenever there is a change in processing from raw to ready-to-eat foods, the new operation shall begin with food-contact surfaces and utensils which are clean and have been sanitized.

(c) Raw fruits and raw vegetables shall be thoroughly washed with potable water before being cooked or served.

(d) Potentially hazardous foods requiring

cooking shall be cooked to heat all parts of the food to a temperature of at least 140° F, except that:

- (1) Poultry, poultry stuffings, stuffed meats and stuffings containing meat shall be cooked to heat all parts of the food to at least 165° F with no interruption of the cooking process;
- (2) Pork and any food containing pork shall be cooked to heat all parts of the food to at least 165° F with no interruption in the cooking process;
- (3) Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C);
- (4) (3) Rare roast beef shall be cooked to an internal temperature of at least 130° F with no interruption in the cooking process.

(e) Raw animal products cooked in a microwave oven shall be rotated during cooking to compensate for uneven heat distribution and shall be heated an additional 25° F (13.9° C) to compensate for shorter cooking times.

(f) Potentially hazardous foods that have been cooked and then refrigerated, shall be reheated rapidly to an internal temperature of 165° F or higher before being served or before being placed in a hot food storage unit. except that, food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C). Steam tables, warmers, and similar hot food holding units are prohibited for the rapid reheating of potentially hazardous foods. Potentially hazardous foods reheated in a microwave oven shall be heated an additional 25° F (13.9° C).

(g) Metal stem-type numerically scaled indicating thermometers, accurate to $\pm 2^{\circ}$ F, shall be provided and used to assure the attainment and maintenance of proper internal cooking, holding, or refrigeration temperatures of all potentially hazardous foods.

- (h) Potentially hazardous foods shall be thawed:
- (1) In refrigerated units at a temperature not to exceed 45° F;
- (2) Under potable running water of a temperature of 70° F or below, with sufficient water velocity to agitate and float off loose food particles into the overflow;
- (3) In a microwave oven only when the food will be immediately transferred to conventional cooking equipment as part of a continuous cooking process or

- when the entire, uninterrupted cooking process takes place in the microwave oven; or
- (4) As part of the conventional cooking process.

Statutory Authority G.S. 110-91.

SECTION .3000 - BED AND BREAKFAST INNS

.3006 FOOD SOURCES AND PROTECTION

(a) All food shall be from approved sources, clean, wholesome, free from adulteration and spoilage, safe for human consumption and shall be stored, handled, served, or transported in such a manner as to prevent contamination, adulteration or spoilage. Only Grade "A" milk shall be used. All food storage shall be at least 15 inches (38.1 cm) above the floor or otherwise arranged to permit the thorough cleaning.

(b) Foods that are spoiled or otherwise unfit for human consumption shall be immediately disposed of as garbage.

(c) Potentially hazardous foods shall be kept at or below 45° F (7° C), except when being prepared or served. An air temperature thermometer accurate to $\pm 3^{\circ}$ F ($\pm 1\frac{1}{2}^{\circ}$ C) shall be provided in all refrigerators.

(d) Thawing of potentially hazardous food shall be done in refrigerated units at a temperature not to exceed 45° F (7° C) or under cold running water no warmer than 70° F (21° C), or as a part of the cooking process.

(e) Employees preparing food shall have used anti-bacterial soap, dips, or hand sanitizers immediately prior to food preparation or shall use clean, plastic disposable gloves or sanitized utensils during food preparation. This requirement is in addition to all handwashing requirements in Rule .3007 of this Section.

(f) Preparation surfaces which come in contact with potentially hazardous food shall be cleaned and sanitized as provided in Rule .3008 of this Section.

(g) Potentially hazardous foods requiring cooking shall be cooked to heat all parts of the food to a temperature of at least 140° F (60° C) with no interruptions of the cooking process, except as follows:

- (1) poultry shall be cooked to heat all parts to at least 165° F (74° C), and
- (2) pork shall be cooked to heat all parts of the food to at least 150° F (66° C), and
- (3) potentially hazardous foods that have

been cooked and then refrigerated shall be reheated rapidly to 165° F (74° C) or higher throughout before being served or placed in hot food storage. except that, food in intact packages from regulated food manufacturing plants may initially be reheated to 140° F (60° C), and

- (4) Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C).

(h) Raw eggs or foods containing uncooked eggs shall not be served. Pasteurized egg products may be substituted for raw eggs.

(i) A metal stem-type thermometer accurate to $\pm 2^{\circ}$ F ($\pm 1^{\circ}$ C) shall be available to check food temperatures.

(j) Food once served to a customer shall not be served again and not left for the next customer. Packaged food, other than potentially hazardous food, that is still packaged and is still wholesome may be reserved re-served.

(k) Pets shall not be allowed at any time in any room or area in which food is prepared or stored. Pets, unless caged and restricted from the immediate eating area, shall not be allowed in any room or area in which food is served.

Statutory Authority G.S. 130A-248.

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Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 19A .0202.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on July 23, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: SB 799 was introduced and language in this bill would serve to strengthen the control of HIV and replace current Communicable Disease rules under 15A NCAC 19A .0202(11).

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE COMMISSION FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 19 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 19A - COMMUNICABLE DISEASE CONTROL

SECTION .0200 - CONTROL MEASURES FOR COMMUNICABLE DISEASES

.0202 CONTROL MEASURES - HIV

The following are the control measures for the Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) infection:

- (1) Infected persons shall:
 - (a) refrain from sexual intercourse unless condoms are used; exercise caution when using condoms due to possible condom failure;
 - (b) not share needles or syringes;
 - (c) not donate or sell blood, plasma, platelets, other blood products, semen, ova, tissues, organs, or breast milk;
 - (d) have a skin test for tuberculosis;

- (e) notify future sexual intercourse partners of the infection; if the time of initial infection is known, notify persons who have been sexual intercourse and needle partners since the date of infection; and, if the date of initial infection is unknown, notify persons who have been sexual intercourse and needle partners for the previous year.
- (2) The attending physician shall:
 - (a) give the control measures in Paragraph Item (1) of this Rule to infected patients, in accordance with 15A NCAC 19A .0210;
 - (b) If the attending physician knows the identity of the spouse of an HIV-infected patient and has not, with the consent of the infected patient, notified and counseled the spouse appropriately, the physician shall list the spouse on a form provided by the Division of Epidemiology and shall mail the form to the Division; the Division will undertake to counsel the spouse; the attending physician's responsibility to notify exposed and potentially exposed persons is satisfied by fulfilling the requirements of Subparagraph Sub-Item (2)(a) and (b) of this Rule;
 - (c) advise infected persons concerning proper clean-up of blood and other body fluids;
 - (d) advise infected persons concerning the risk of perinatal transmission and transmission by breastfeeding.
- (3) The attending physician of a child who is infected with HIV and who may pose a significant risk of transmission in the school or day care setting because of open, oozing wounds or because of behavioral abnormalities such as biting shall notify the local health director. The local health director shall consult with the attending physician and investigate the circumstances.
 - (a) If the child is in school or scheduled for admission and the local health director determines that there may be a significant risk of transmission, the local health director shall consult with an interdisciplinary committee, which shall include appropriate school personnel, a medical expert, and the child's parent or guardian to assist in

- the investigation and determination of risk. The local health director shall notify the superintendent or private school director of the need to appoint such an interdisciplinary committee.
- (i) If the superintendent or private school director establishes such a committee within three days of notification, the local health director shall consult with this committee.
- (ii) If the superintendent or private school director does not establish such a committee within three days of notification, the local health director shall establish such a committee.
- (b) If the child is in school or scheduled for admission and the local health director determines, after consultation with the committee, that a significant risk of transmission exists, the local health director shall:
- (i) notify the parents;
- (ii) notify the committee;
- (iii) assist the committee in determining whether an adjustment can be made to the student's school program to eliminate significant risks of transmission;
- (iv) determine if an alternative educational setting is necessary to protect the public health;
- (v) instruct the superintendent or private school director concerning appropriate protective measures to be implemented in the alternative educational setting developed by appropriate school personnel; and
- (vi) consult with the superintendent or private school director to determine which school personnel directly involved with the child need to be notified of the HIV infection in order to prevent transmission and ensure that these persons are instructed regarding the necessity for protecting confidentiality.
- (c) If the child is in day care and the local health director determines that there is a significant risk of transmission, the local health director shall notify the parents that the child must be placed in an alternate child care setting that eliminates the significant risk of transmission.
- (4) When health care workers or other persons have a needlestick or nonsexual

- non-intact skin or mucous membrane exposure to blood or body fluids that poses a significant risk of HIV transmission, the following shall apply:
- (a) When the source person is known:
- (i) The attending physician or occupational health care provider responsible for the exposed person, if other than the attending physician of the person whose blood or body fluids is the source of the exposure, shall notify the attending physician of the source that an exposure has occurred. The attending physician of the source person shall discuss the exposure with the source and shall test the source for HIV infection unless the source is already known to be infected. The attending physician of the exposed person shall be notified of the infection status of the source.
- (ii) The attending physician of the exposed person shall inform the exposed person about the infection status of the source, offer testing for HIV infection as soon as possible after exposure and at reasonable intervals up to one year to determine whether transmission occurred, and, if the source person was HIV infected, give the exposed person the control measures listed in Subparagraphs Sub-Item (1)(a) through (c) of this Rule. The attending physician of the exposed person shall instruct the exposed person regarding the necessity for protecting confidentiality.
- (b) When the source person is unknown, the attending physician of the exposed person shall inform the exposed person of the risk of transmission and offer testing for HIV infection as soon as possible after exposure and at reasonable intervals up to one year to determine whether transmission occurred. A health care facility may release the name of the attending physician of a source person upon request of the attending physician of an exposed person.
- (5) The attending physician shall notify the local health director when the physician, in good faith, has reasonable cause to suspect a patient infected with HIV is not following or cannot follow control mea-

- sures and is thereby causing a significant risk of transmission. Any other person may notify the local health director when the person, in good faith, has reasonable cause to suspect a person infected with HIV is not following control measures and is thereby causing a significant risk of transmission.
- (6) When the local health director is notified pursuant to ~~Paragraph Item~~ (5) of this Rule, of a person who is mentally ill or mentally retarded, the local health director shall confer with the attending mental health physician or appropriate mental health authority and the physician, if any, who notified the local health director to develop an appropriate plan to prevent transmission.
- (7) The Director of Health Services of the North Carolina Department of Correction and the prison facility administrator shall be notified when any person confined in a state prison is determined to be infected with HIV. If the prison facility administrator, in consultation with the Director of Health Services, determines that a confined HIV infected person is not following or cannot follow prescribed control measures, thereby presenting a significant risk of HIV transmission, the administrator and the Director shall develop and implement jointly a plan to prevent transmission, including making appropriate recommendations to the unit housing classification committee.
- (8) The local health director shall ensure that the health plan for local jails include education of jail staff and prisoners about HIV, how it is transmitted, and how to avoid acquiring or transmitting this infection.
- (9) Local health departments shall provide testing for HIV infection with individual pre- and post-test counseling at no charge to the patient. Third party payors may only be billed for HIV counseling and testing when such services are provided as a part of family planning and maternal and child health services. By August 1, 1991, the State Health Director shall designate a minimum of 16 local health departments to provide anonymous testing. Beginning September 1, 1991, only cases of confirmed HIV infection identified by anonymous tests conducted at local health departments designated as anonymous testing sites pursuant to this ~~Subparagraph Sub-Item~~ shall be reported in accordance with 15A NCAC 19A .0102(a)(3). All other cases of confirmed HIV infection shall be reported in accordance with 15A NCAC 19A .0102(a)(1) and (2). Effective September 1, 1994, anonymous testing shall be discontinued and all cases of confirmed HIV infection shall be reported in accordance with 15A NCAC 19A .0102(a)(1) and (2).
- (10) Appropriate counseling for HIV testing shall include individualized pre- and post-test counseling which provides risk assessment, risk reduction guidelines, appropriate referrals for medical and psychosocial services, and, when the person tested is determined to be infected with HIV, control measures.
- (11) ~~A person charged with an offense that involves nonconsensual vaginal, anal, or oral intercourse, or that involves vaginal, anal, or oral intercourse with a child 12 years old or less shall be tested for HIV infection if:~~
- (a) ~~probable cause has been found or an indictment has been issued;~~
- (b) ~~the victim notifies the local or state health director and requests information concerning the HIV status of the defendant; and~~
- (c) ~~the local or state health director determines that the alleged sexual contact involved in the offense would pose a significant risk of transmission of HIV if the defendant were HIV infected. If in custody of the Department of Correction, the person shall be tested by the Department of Correction and if not in custody, the person shall be tested by the local health department. The Department of Correction shall inform the local health director of all such test results. The local health director shall inform the victim of the results of the test, counsel the victim appropriately, and instruct the victim regarding the necessity for protecting confidentiality.~~
- (12) (11) A local health department or the Department may release information regarding an infected person pursuant to G.S. 130A-143(3) only when the local health department or the Department has provided direct medical care to the infect-

- ed person and refers the person to or consults with the health care provider to whom the information is released.
- (13) (12) Notwithstanding Rule .0201(d) of this Section, a local or state health director may require, as a part of an isolation order issued in accordance with G.S. 130A-145, compliance with a plan to assist the individual to comply with control measures. The plan shall be designed to meet the specific needs of the individual and may include one or more of the following available and appropriate services:
- (a) substance abuse counseling and treatment;
 - (b) mental health counseling and treatment; and
 - (c) education and counseling sessions about HIV, HIV transmission, and behavior change required to prevent transmission.
- (14) (13) The Division of Epidemiology shall conduct a partner notification program to assist in the notification and counseling of partners of HIV infected persons. All partner identifying information obtained as a part of the partner notification program shall be destroyed within two years.

Statutory Authority G.S. 130A-133; 130A-135; 130A-144; 130A-145; 130A-148(h).

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Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 19B .0501.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on July 23, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: To change the name of the Chemical Tests for Alcohol Branch to the Forensic Tests for Alcohol Branch. This change is due to the new infrared technology being

used rather than chemicals used with the breathalyzer.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

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CHAPTER 19 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 19B - INJURY CONTROL

SECTION .0500 - ALCOHOL SCREENING TEST DEVICES

.0501 SCREENING TESTS FOR ALCOHOL CONCENTRATION

(a) This Section governs the requirement of G.S. 20-16.3 that the commission examine devices suitable for use by law enforcement officers in making on-the-scene tests of drivers for alcohol concentration and that the commission approve these devices and their manner of use. In examining devices for making chemical tests for alcohol analyses, the commission finds that at present only screening devices for testing the breath of drivers are suitable for on-the-scene use by law enforcement officers.

(b) This Section does not address or in any way

restrict the use of screening tests for impairment other than those based on chemical testing for alcohol concentration analyses, including various psychophysical tests for impairment.

Statutory Authority G.S. 20-16.3; 20-16.3A.

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Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 21G .0107 and .0508.

The proposed effective date of this action is October 1, 1993.

The public hearings will be conducted at 10:00 a.m. on July 23, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: To ensure that there will be no misunderstanding or misinterpretation of the policy that has always been in place regarding not billing families whose incomes are below the Federal poverty level. The DECs have never imposed charges for services provided to families whose income level is below the Federal poverty level. This amendment clarifies that policy, which has always been understood and practiced in the DECs, statewide.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

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CHAPTER 21 - HEALTH: PERSONAL HEALTH

SUBCHAPTER 21G - DEVELOPMENTAL EVALUATION CENTERS: SPECIALIZED SERVICES BRANCH

SECTION .0100 - GENERAL POLICIES

.0107 FEES

Fees for services provided in the operation of a Developmental Evaluation Center shall be determined on the basis of a schedule of co-payments related to income and family size. Copies of this schedule of co-payments may be inspected at, or obtained from, any Developmental Evaluation Center or the program office. Centers shall also attempt to collect from other appropriate third-party funding sources. No one will be denied service based solely on an inability or failure to pay. Charges will not be imposed on families whose income is below the Federal poverty level.

Statutory Authority G.S. 130A-5(3); 130A-124.

SECTION .0500 - DEC CONTRACT FUNDS

.0508 CLIENT AND THIRD PARTY FEES

(a) DEC contractual agencies are required to bill all available and appropriate reimbursement sources including but not limited to insurance companies, Medicaid, other agency providers or parents/guardians. Charges will not be imposed on families whose income is below the Federal poverty level. Outpatient services cannot be billed to the Children's Special Health Services Program by a DEC.

(b) These fees will be based on a public schedule of charges as determined by the DEC Program and on the Title XIX Memorandum of Understanding between the contractor and the division governing Medicaid reimbursement.

(c) All fee collections must be budgeted and expended during the fiscal year earned or within the subsequent fiscal year. Fees will be utilized, upon approval of the program, to either expand program services or to reduce the amount of state appropriations.

(d) All fees held in escrow and brought forward from the prior fiscal year shall be expended prior to the expenditure of state appropriations.

(e) All fees earned in excess of the original budgeted amount cannot be budgeted or expended without prior written approval of the program director and the division.

Statutory Authority G.S. 130A-124.

TITLE 21 - OCCUPATIONAL LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Medical Examiners intends to adopt rules cited as 21 NCAC 32B .0801 - .0808.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 9:00 a.m. on July 20, 1993 at the NC Board of Medical Examiners, 1203 Front Street, Raleigh, NC.

Reason for Proposed Action:

21 NCAC 32B .0801 - Defines the practice parameters of a physician issued a license limited to a NC medical school faculty.

21 NCAC 32B .0802 - Requires applicants for a NC medical faculty license to submit verification of an appointment at a NC medical school.

21 NCAC 32B .0803 - Requires the applicant to complete an application form regarding background information.

21 NCAC 32B .0804 - Requires application fee.

21 NCAC 32B .0805 - Requires certified photograph and graduation certification from applicant's medical school in order to assure the identity of the applicant.

21 NCAC 32B .0806 - Requires that applicant request status of licensure reports from every state in which he has been licensed and the Board's staff requests a report from the AMA on each applicant.

21 NCAC 32B .0807 - Requires letters of recom-

mendation as part of the credentialing.

21 NCAC 32B .0808 - Requires a personal interview before issuance of licensure.

***C*omment Procedures: Persons interested may present written or oral statements relevant to the actions proposed at a hearing to be held as indicated above. Written statements not presented at the hearing should be directed by August 2, 1993 to the following address: Administrative Procedures, NCBME, PO Box 26808, Raleigh, NC 27611-6808.**

CHAPTER 32 - BOARD OF MEDICAL EXAMINERS

SUBCHAPTER 32B - LICENSE TO PRACTICE MEDICINE

SECTION .0800 - MEDICAL SCHOOL FACULTY LICENSE

.0801 DEFINITION OF PRACTICE

The license for Medical School Faculty limits the practice of its holder to the confines of the physician's employment as a member of the medical faculty at one of the following North Carolina medical schools:

- (1) Duke University School of Medicine;**
- (2) University of North Carolina at Chapel Hill School of Medicine;**
- (3) East Carolina University School of Medicine; and**
- (4) Bowman Gray School of Medicine.**

This license will not be used to engage in a practice outside the realm of the medical school.

Statutory Authority G.S. 90-12.

.0802 ELIGIBILITY REQUIREMENTS

(a) To be eligible, the applicant shall have received full-time appointment as either a lecturer, assistant professor, associate professor or full professor at one of the following medical schools:

- (1) Duke University School of Medicine;**
- (2) University of North Carolina at Chapel Hill School of Medicine;**
- (3) Bowman Gray School of Medicine;**
- (4) East Carolina University School of Medicine.**

(b) The applicant must submit verification and details of the appointment signed by the Dean or Acting Dean of the Medical School in which the applicant is to practice.

Statutory Authority G.S. 90-12.

.0803 APPLICATION

An applicant must complete the Board's application form which will include information regarding personal, educational and professional background.

Statutory Authority G.S. 90-6; 90-12.

.0804 FEE

A nonrefundable fee of one hundred fifty dollars (\$150.00) is due at the time of application.

Statutory Authority G.S. 90-15.

.0805 CERTIFIED PHOTOGRAPH AND CERTIFICATE OF GRADUATION

An applicant must submit a recent photograph, at least 2 1/2 inches by 3 1/4 inches, certified on the back as a true likeness of the applicant by the dean or other official of the applicant's medical school indicating the applicant's date of graduation from medical school. This certification must bear the signature of the dean or other official of the medical school and the seal of the medical school.

Statutory Authority G.S. 90-12.

.0806 VERIFICATION OF MEDICAL LICENSURE

An applicant must request that reports be submitted to the Board directly from all states in which the applicant has ever been licensed to practice medicine indicating the status of the applicant's license and whether or not the license has been revoked, suspended, surrendered, or placed on probationary terms.

An AMA Physician Profile is requested of AMA by the Board.

Statutory Authority G.S. 90-12.

.0807 LETTERS OF RECOMMENDATION

An applicant must request that no less than three letters of recommendation be submitted to the Board on his behalf. Two of these letters must be from physicians. One of the letters must be from someone who has known the applicant for a period of ten years.

Statutory Authority G.S. 90-11; 90-12.

.0808 PERSONAL INTERVIEW

The applicant must appear for a personal inter-

view before the Executive Secretary, Assistant Executive Secretary, a Board member, an agent of the Board or the full Board.

Statutory Authority G.S. 90-12.

The List of Rules Codified is a listing of rules that were filed with OAH in the month indicated.

Key:

<i>Citation</i>	= Title, Chapter, Subchapter and Rule(s)
<i>AD</i>	= Adopt
<i>AM</i>	= Amend
<i>RP</i>	= Repeal
<i>With Chgs</i>	= Final text differs from proposed text
<i>Corr</i>	= Typographical errors or changes that requires no rulemaking
<i>Eff. Date</i>	= Date rule becomes effective
<i>Temp. Expires</i>	= Rule was filed as a temporary rule and expires on this date or 180 days

NORTH CAROLINA ADMINISTRATIVE CODE

MAY 93

TITLE	DEPARTMENT	TITLE	DEPARTMENT
2	Agriculture	17	Revenue
4	Commerce	21	Occupational Licensing Boards
10	Human Resources	14 - Cosmetic Art Examiners	
11	Insurance	18 - Electrical Contractors	
12	Justice	19 - Electrolysis	
13	Labor	36 - Nursing	
15A	Environment, Health, and Natural Resources	42 - Optometry	

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
2	NCAC 38 .0701		✓		✓		06/01/93	
	43L .0401 - .0403		✓		✓		10/01/93	
	.0405		✓		✓		10/01/93	
	48A .0206 - .0207		✓		✓		06/01/93	
	.0212			✓			06/01/93	
	.0216		✓		✓		06/01/93	
	.0224			✓			06/01/93	
	.1702		✓		✓		06/01/93	
	.1703		✓				06/01/93	
4	NCAC 2R .1502					✓		

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
19L	.0101					✓		
4 NCAC	19L .0103		✓		✓		06/01/93	
	.0104 - .0106					✓		
	.0301		✓		✓		06/01/93	
	.0302					✓		
	.0401		✓				06/01/93	
	.0403 - .0404		✓				06/01/93	
	.0407 - .0408		✓				06/01/93	
	.0501 - .0502		✓				06/01/93	
	.0505		✓				06/01/93	
	.0801					✓		
	.0802		✓				06/01/93	
	.0805		✓				06/01/93	
	.0901 - .0903		✓				06/01/93	
	.0904					✓		
	.0905			✓			06/01/93	
	.0906 - .0907		✓				06/01/93	
	.0908 - .0909		✓		✓		06/01/93	
	.0910 - .0911		✓				06/01/93	
	.0912 - .0913		✓		✓		06/01/93	
	.0914	✓			✓		06/01/93	
	.1001 - .1002		✓				06/01/93	
	.1003 - .1004		✓		✓		06/01/93	
	.1006					✓		
	.1007		✓				06/01/93	
	.1008 - .1010					✓		
	.1011		✓		✓		06/01/93	
	.1012		✓				06/01/93	
	.1013					✓		
	.1101		✓		✓		06/01/93	
	.1102					✓		
	.1103 - .1104		✓				06/01/93	
	.1105					✓		

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
	.1201 - .1203					✓		
4 NCAC 19L	.1301					✓		
	.1302 - .1303		✓				06/01/93	
	.1501 - .1504		✓				06/01/93	
	.1505		✓		✓		06/01/93	
	.1601 - .1602					✓		
	.1603		✓				06/01/93	
	.1604		✓		✓		06/01/93	
10 NCAC 14L	.0602	✓					05/10/93	180 DAYS
	19G .0502		✓				06/01/93	
	26D .0012		✓		✓		06/01/93	
	26N .0201	✓			✓		06/01/93	
	41E .0514		✓		✓		07/01/93	
	50B .0313					✓		
	.0403					✓		
11 NCAC 11H	.0001	✓			✓		06/01/93	
12 NCAC 7D	.0809		✓		✓		06/01/93	
13 NCAC 7C	.0102		✓				06/01/93	
	.0105 - .0106			✓			06/01/93	
	.0108 - .0109			✓			06/01/93	
15A NCAC 1K	.0402		✓				06/01/93	180 DAYS
	2B .0503					✓		
	.0508					✓		
11 .0101			✓		✓		06/01/93	
	.0102		✓		✓		05/01/93	
	.0104		✓		✓		06/01/93	
	.0105		✓				05/01/93	
	.0106		✓		✓		06/01/93	
	.0107		✓				05/01/93	
	.0108		✓		✓		06/01/93	
	.0111		✓				05/01/93	
	.0113		✓		✓		05/01/93	
	.0114 - .0115		✓				05/01/93	

LIST OF RULES CODIFIED

Citation	AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.0117	✓			✓		06/01/93	
15A NCAC 11 .0118	✓					05/01/93	
.0201		✓				05/01/93	
.0205		✓		✓		06/01/93	
.0207		✓		✓		06/01/93	
.0210		✓				05/01/93	
.0212 - .0214		✓		✓		06/01/93	
.0301		✓		✓		05/01/93	
.0303 - .0304		✓				05/01/93	
.0305		✓		✓		06/01/93	
.0307 - .0309		✓				01/01/94	
.0311 - .0312		✓				01/01/94	
.0314 - .0315		✓				01/01/94	
.0316		✓		✓		06/01/93	
.0318		✓				05/01/93	
.0321		✓		✓		05/01/93	
.0324 - .0325		✓		✓		06/01/93	
.0326		✓				05/01/93	
.0328		✓		✓		01/01/94	
.0331		✓				01/01/94	
.0335		✓				01/01/94	
.0336			✓			05/01/93	
.0337		✓		✓		06/01/93	
.0338		✓		✓		05/01/93	
.0343		✓				05/01/93	
.0344 - .0345		✓		✓		06/01/93	
.0346		✓				05/01/93	
.0348 - .0349		✓		✓		01/01/94	
.0352		✓				05/01/93	
.0353		✓				01/01/94	
.0501		✓				05/01/93	
.0502		✓				01/01/94	
.0506		✓				01/01/94	

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
	.0507		✓		✓		06/01/93	
15A NCAC 11	.0510		✓				06/01/93	
	.0513 - .0514		✓				01/01/94	
	.0516		✓				01/01/94	
	.0518		✓		✓		06/01/93	
	.0520		✓				01/01/94	
	.0601		✓				01/01/94	
	.0602		✓		✓		06/01/93	
	.0603 - .0604		✓		✓		01/01/94	
	.0605 - .0606		✓				05/01/93	
	.0607 - .0610		✓				01/01/94	
	.0701		✓				05/01/93	
	.0702		✓		✓		01/01/94	
	.0703		✓		✓		06/01/93	
	.0804		✓		✓		01/01/94	
	.0901		✓		✓		01/01/94	
	.0902		✓				05/01/93	
	.0905		✓		✓		01/01/94	
	.0906 - .0907		✓				01/01/94	
	.0910		✓				01/01/94	
	.1001		✓				05/01/93	
	.1002		✓				01/01/94	
	.1004		✓				01/01/94	
	.1006		✓				05/01/93	
	.1102 - .1104		✓				05/01/93	
	.1201		✓		✓		01/01/94	
	.1202 - .1203		✓				05/01/93	
	.1205		✓		✓		06/01/93	
	.1206		✓		✓		01/01/94	
	.1208		✓				01/01/94	
	.1210		✓		✓		06/01/93	
	.1214		✓		✓		01/01/94	
	.1215		✓		✓		06/01/93	

LIST OF RULES CODIFIED

Citation	AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.1218		✓				05/01/93	
15A NCAC 11 .1220 - .1221		✓				05/01/93	
.1223		✓				05/01/93	
.1225		✓				01/01/94	
.1227		✓				05/01/93	
.1229		✓				05/01/93	
.1230		✓		✓		01/01/94	
.1233		✓				01/01/94	
.1238		✓		✓		01/01/94	
.1239 - .1240		✓				05/01/93	
.1241 - .1242		✓				01/01/94	
.1301		✓		✓		01/01/94	
.1304		✓				01/01/94	
.1306		✓				05/01/93	
.1307		✓				01/01/94	
.1308		✓		✓		05/01/93	
.1309 - .1310		✓				05/01/93	
.1313		✓				05/01/93	
.1314		✓				01/01/94	
.1315		✓				01/01/94	
.1320		✓		✓		01/01/94	
.1324		✓				01/01/94	
.1403		✓				05/01/93	
.1405		✓		✓		06/01/93	
.1412		✓				06/01/93	
.1414 - .1415		✓		✓		06/01/93	
.1418		✓				05/01/93	
.1420	✓			✓		05/01/93	
.1421	✓			✓		06/01/93	
.1422	✓					05/01/93	
.1501 - .1504	✓			✓		01/01/95	
.1505 - .1506	✓					01/01/95	
.1507 - .1513	✓			✓		01/01/95	

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
	.1514	✓					01/01/95	
15A NCAC 11	.1515	✓			✓		01/01/95	
	.1516	✓					01/01/95	
	.1517	✓			✓		01/01/95	
	.1601 - .1602	✓			✓		01/01/94	
	.1603 - .1604	✓					01/01/94	
	.1605 - .1606	✓			✓		01/01/94	
	.1607 - .1609	✓					01/01/94	
	.1610	✓			✓		01/01/94	
	.1611	✓					01/01/94	
	.1612	✓			✓		01/01/94	
	.1613 - .1614	✓					01/01/94	
	.1615 - .1617	✓			✓		01/01/94	
	.1618 - .1620	✓					01/01/94	
	.1621	✓			✓		01/01/94	
	.1622 - .1637	✓					01/01/94	
	.1638	✓			✓		01/01/94	
	.1639	✓					01/01/94	
	.1640	✓			✓		01/01/94	
	.1641 - .1652	✓					01/01/94	
13B	.0201		✓				05/19/93	180 DAYS
18A	.2537		✓				05/11/93	180 DAYS
17 NCAC 3A	.0001 - .0003			✓			06/01/93	
3B	.0101			✓			06/01/93	
	.0102		✓				06/01/93	
	.0105			✓			06/01/93	
	.0107			✓			06/01/93	
	.0109		✓				06/01/93	
	.0111 - .0112		✓				06/01/93	
	.0201 - .0204			✓			06/01/93	
	.0302					✓		
3C	.0001 - .0002			✓			06/01/93	
	.0008	✓					06/01/93	

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
	6A .0001 - .0005			✓			06/01/93	
17 NCAC 6B	.0104 - .0107		✓				06/01/93	
	.0110 - .0111			✓			06/01/93	
	.0112 - .0117		✓				06/01/93	
	.0605 - .0607		✓				06/01/93	
	.0608			*			06/01/93	
	.0609 - .0610		✓				06/01/93	
	.0611			✓			06/01/93	
	.3201 - .3202			✓			06/01/93	
	.3203 - .3204		✓				06/01/93	
	.3205			✓			06/01/93	
	.3206 - .3207		✓				06/01/93	
	.3208 - .3209			✓			06/01/93	
	.3401			✓			06/01/93	
	.3402		✓				06/01/93	
	.3403			✓			06/01/93	
	.3404		✓				06/01/93	
	.3405			✓			06/01/93	
	.3408		✓				06/01/93	
	.3503		✓				06/01/93	
	.3513		✓				06/01/93	
	.3522			✓			06/01/93	
	.3526 - .3527		✓				06/01/93	
	.3701			✓			06/01/93	
	.3714		✓				06/01/93	
	.3716		✓				06/01/93	
	.3719		✓				06/01/93	
	.3720			✓			06/01/93	
	.3723 - .3724		✓				06/01/93	
	.3804		✓				06/01/93	
	.3901 - .3904		✓				06/01/93	
	.4001 - .4002			✓			06/01/93	
	.4003 - .4004		✓				06/01/93	

LIST OF RULES CODIFIED

Citation		AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
	.4006		✓				06/01/93	
17 NCAC 6B	.4007 - .4008			✓			06/01/93	
	.4101		✓				06/01/93	
	.4103		✓				06/01/93	
	.4104 - .4105			✓			06/01/93	
6C	.0102			✓			06/01/93	
	.0105 - .0106			✓			06/01/93	
	.0107		✓				06/01/93	
	.0109			✓			06/01/93	
	.0111			✓			06/01/93	
	.0112		✓				06/01/93	
	.0123		✓				06/01/93	
	.0125			✓			06/01/93	
	.0126		✓				06/01/93	
	.0201		✓				06/01/93	
	.0202			✓			06/01/93	
	.0203 - .0204		✓				06/01/93	
6D	.0101			✓			06/01/93	
	.0102		✓				06/01/93	
	.0206			✓			06/01/93	
	.0208 - .0210		✓				06/01/93	
	.0211			✓			06/01/93	
11	.0207 - .0209					✓		
	.0212 - .0213					✓		
	.0219					✓		
21 NCAC 14A	.0101		✓		✓		06/01/93	
14N	.0106		✓				06/01/93	
	.0113		✓		✓		06/01/93	
18B	.0701		✓				06/01/93	
19	.0401 - .0402	✓			✓		06/01/93	
	.0403	✓					06/01/93	
	.0601	✓			✓		06/01/93	
36	.0220		✓		✓		06/01/93	

LIST OF RULES CODIFIED

Citation	AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
42E .0104	✓			✓		06/01/93	
21 NCAC 42E .0201		✓		✓		06/01/93	
.0302		✓		✓		06/01/93	

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

ADMINISTRATION

Department of Administration's Minimum Criteria

1 NCAC 39 .0101 - Purpose Agency Revised Rule	RRC Objection 06/17/93
1 NCAC 39 .0301 - Exceptions to Minimum Criteria	RRC Objection 06/17/93

Environmental Policy Act

1 NCAC 25 .0213 - Environmental Policy Act Advisory Committee Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
1 NCAC 25 .0401 - Method of Compliance Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
1 NCAC 25 .0506 - Review Process Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
1 NCAC 25 .0603 - Format and Content Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93

Veterans Affairs

1 NCAC 26C .0005 - Fee Agency Revised Rule	RRC Objection 06/17/93 Obj. Removed 06/17/93
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AGRICULTURE

Plant Industry

2 NCAC 48A .0206 - The Transportation of Bees Agency Revised Rule	RRC Objection 05/19/93 Obj. Removed 05/19/93
2 NCAC 48A .0207 - Requirements for Issuance of Permit Agency Revised Rule	RRC Objection 05/19/93 Obj. Removed 05/19/93

COMMERCE

Cemetery Commission

4 NCAC 5B .0103 - Hearings Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
4 NCAC 5D .0101 - Report Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
4 NCAC 5D .0201 - Report Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93
4 NCAC 5D .0202 - Delivery Agency Revised Rule	RRC Objection 04/15/93 Obj. Removed 04/15/93

Community Assistance

4 NCAC 19L .0913 - Grant Closeouts	RRC Objection 05/19/93
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RRC OBJECTIONS

<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
4 NCAC 19L .1101 - Reporting	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
4 NCAC 19L .1505 - Preliminary Awards	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
4 NCAC 19L .1604 - Preliminary Awards	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93

Savings Institutions Division: Savings Institutions Commission

4 NCAC 16G .0311 - Required Provisions in Plan of Conversion	<i>RRC Objection</i>	03/18/93
<i>Agency Revised Rule</i>	<i>RRC Objection</i>	03/18/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	04/15/93

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Coastal Management

15A NCAC 7H .1205 - Specific Conditions	<i>RRC Objection</i>	03/18/93
<i>Rule Returned to Agency</i>		04/15/93

Environmental Health

15A NCAC 18A .0911 - Marinas: Docking Facilities: Other Mooring Areas	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
15A NCAC 18A .1601 - Definitions	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
15A NCAC 18A .1725 - Water Quality	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
15A NCAC 18A .2618 - Cleaning of Equipment and Utensils	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93

Environmental Management

15A NCAC 2D .0903 - Recordkeeping: Reporting: Monitoring	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
15A NCAC 2H .1110 - Implementation	<i>RRC Objection</i>	02/18/93
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	03/18/93
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	05/19/93
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	06/17/93

Laboratory Services

15A NCAC 20D .0234 - Criteria & Procedures: Decert./Denial/Downgrading	<i>RRC Objection</i>	03/18/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	04/15/93

Radiation Protection

15A NCAC 11 .0108 - Additional Requirements	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
15A NCAC 11 .0207 - Issuance of Notice of Registration	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
15A NCAC 11 .0212 - Modifications: Revocation: Termination of Registrants	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
15A NCAC 11 .0214 - Training/Educational Requirements for Equipment Svcs	<i>RRC Objection</i>	05/19/93

RRC OBJECTIONS

<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
<i>15A NCAC 11 .0337 - Issuance of Specific Licenses</i>	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
<i>15A NCAC 11 .0507 - Leak Testing and Source Tagging</i>	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
<i>15A NCAC 11 .1215 - Conditions of License</i>	<i>RRC Objection</i>	05/19/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93

WTP Operators Certification Commission

<i>15A NCAC 8A .0102 - Creation</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Repealed Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8A .0202 - Duties and Requirements</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0102 - Applying for Examination</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0109 - Requirement for Notification of Change in Address</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0201 - Grade I Wastewater Treatment Plant Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0205 - Definitions</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0207 - Grade II Collection System Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0208 - Grade III Collection System Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0209 - Grade IV Collection System Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0210 - Subsurface System Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0211 - Land Application/Residuals Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0212 - Spray Irrigation Operator</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8B .0502 - Refunding of Fees</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93
<i>15A NCAC 8C .0002 - Rating Scale/Classification/Wastewater Trtmt Facilities</i>	<i>RRC Objection</i>	06/17/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/17/93

HUMAN RESOURCES

Children's Services

<i>10 NCAC 41E .0514 - Child Care & Development: Health</i>	<i>RRC Objection</i>	04/15/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	05/19/93
<i>10 NCAC 41G .0705 - Medical Program</i>	<i>RRC Objection</i>	04/15/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	04/15/93
<i>10 NCAC 41Q .0201 - Personnel</i>	<i>RRC Objection</i>	04/15/93
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	05/19/93
<i>Rule Returned to Agency</i>		06/17/93

Departmental Rules

<i>10 NCAC 1M .0002 - Complaints</i>	<i>RRC Objection</i>	04/15/93
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	04/15/93

RRC OBJECTIONS

<i>10 NCAC 1M .0003 - Investigation Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>

Facility Services

<i>10 NCAC 3C .2020 - Definitions Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3C .2021 - Physician Reqs/Inpatient Rehabilitation Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3C .2030 - Physical Facility Reqs/Inpatient Rehab Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3C .2033 - Deemed Status/Inpatient Rehabilitation Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3H .1150 - Definitions Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3H .1151 - Physician Reqs/Inpatient Rehabilitation Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3H .1160 - Physical Facility Reqs/Inpatient Rehab Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>10 NCAC 3H .1163 - Deemed Status/Inpatient Rehabilitation Facilities or Units Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>

Mental Health: General

<i>10 NCAC 14K .0315 - Treatment/Habilitation Planning and Documentation Agency Revised Rule</i>	<i>RRC Objection</i>	<i>06/17/93</i>
	<i>Obj. Removed</i>	<i>06/17/93</i>

INSURANCE

Actuarial Services

<i>11 NCAC 16 .0303 - Annual Filing Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>

Consumer Services

<i>11 NCAC 4 .0428 - Enforcement Agency Revised Rule Agency Repealed Rule</i>	<i>RRC Objection</i>	<i>03/18/93</i>
	<i>RRC Objection</i>	<i>03/18/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>

Financial Evaluation Division

<i>11 NCAC 11B .0607 - Application - Employers Agency Revised Rule</i>	<i>RRC Objection</i>	<i>03/18/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>11 NCAC 11B .0610 - Application - Groups Agency Revised Rule</i>	<i>RRC Objection</i>	<i>03/18/93</i>
	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>11 NCAC 11H .0001 - Definitions Agency Revised Rule</i>	<i>RRC Objection</i>	<i>05/19/93</i>
	<i>Obj. Removed</i>	<i>05/19/93</i>

JUSTICE

Private Protective Services

<i>12 NCAC 7D .0809 - Authorized Firearms Agency Revised Rule</i>	<i>RRC Objection</i>	<i>04/15/93</i>
	<i>Obj. Removed</i>	<i>05/19/93</i>

LICENSING BOARDS AND COMMISSIONS

Electrolysis Examiners

21 NCAC 19 .0401 - *Infection Control Standards*
Agency Revised Rule

RRC Objection 05/19/93
Obj. Removed 05/19/93

Landscape Architects

21 NCAC 26 .0203 - *General Obligations of Practice: Mandatory Standards*
Agency Repealed Rule

RRC Objection 06/17/93
Obj. Removed 06/17/93

21 NCAC 26 .0205 - *Forms of Practice*

RRC Objection 06/17/93

21 NCAC 26 .0207 - *Application of Professional Seal*

RRC Objection 06/17/93

21 NCAC 26 .0208 - *Improper Conduct*

RRC Objection 06/17/93

21 NCAC 26 .0209 - *Unprofessional Conduct*

RRC Objection 06/17/93

21 NCAC 26 .0210 - *Dishonest Practice*

RRC Objection 06/17/93

21 NCAC 26 .0211 - *Incompetence*

RRC Objection 06/17/93

21 NCAC 26 .0301 - *Examination*

RRC Objection 06/17/93

Medical Examiners

21 NCAC 32B .0315 - *Ten Year Qualification*
Agency Revised Rule

RRC Objection 06/17/93
Obj. Removed 06/17/93

Real Estate Commission

21 NCAC 58A .0110 - *Broker-in-Charge*
Agency Revised Rule

RRC Objection 06/17/93
Obj. Removed 06/17/93

21 NCAC 58A .0506 - *Salesman to be Supervised by Broker*
Agency Revised Rule

RRC Objection 06/17/93
Obj. Removed 06/17/93

21 NCAC 58C .0305 - *Course Scheduling*
Agency Revised Rule

RRC Objection 06/17/93
Obj. Removed 06/17/93

REVENUE

Ad Valorem Tax Division

17 NCAC 10 .0506 - *Certification Requirements for County Appraisers*
17 NCAC 10 .0508 - *Certification Requirements for Private Firm Appraisers*

RRC Objection 06/17/93
RRC Objection 06/17/93

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

10 NCAC 3H .0315(b) - NURSING HOME PATIENT OR RESIDENT RIGHTS

Dolores O. Nesnow, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 10 NCAC 3H .0315(b) void as applied in *Barbara Jones, Petitioner v. North Carolina Department of Human Resources, Division of Facility Services, Licensure Section, Respondent* (92 DHR 1192).

15A NCAC 3O .0201(a)(1)(A) - STDS FOR SHELLFISH BOTTOM & WATER COLUMN LEASES

Julian Mann III, Chief Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 3O .0201(a)(1)(A) void as applied in *William R. Willis, Petitioner v. North Carolina Division of Marine Fisheries, Respondent* (92 EHR 0820).

15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
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ADMINISTRATION

LMS Express, Inc. v. Administration, Div of Purchase & Contract	92 DOA 0735	Morgan	06/04/93	
Stauffer Information Systems v. Community Colleges & Administration	92 DOA 0803	West	06/10/93	8:7 NCR 613
McLaurin Parking Co. v. Administration	92 DOA 1662	Morrison	04/02/93	8:3 NCR 320

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Alcoholic Beverage Control Comm. v. Ann Oldham McDowell	92 ABC 0260	Morgan	04/01/93	
Curtis Ray Lynch v. Alcoholic Beverage Control Comm.	92 ABC 0288	Gray	05/18/93	
Alcoholic Beverage Control Comm. v. Partnership, Phillip Owen Edward	92 ABC 0978	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Gary Morgan Neugent	92 ABC 1086	Beeton	03/22/93	
Alcoholic Beverage Control Comm. v. Kirby Ronald Eldridge	92 ABC 1153	Chess	04/26/93	
Alcoholic Beverage Control Comm. v. Gloria Black McDuffie	92 ABC 1476	West	05/26/93	
Alcoholic Beverage Control Comm. v. Larry Isaac Hailstock	92 ABC 1483	Reilly	04/07/93	
Johnnie L. Baker v. Alcoholic Beverage Control Commission	92 ABC 1735	Chess	05/07/93	
Alcoholic Beverage Control Comm. v. Aubrey Rudolph Wallace	93 ABC 0047	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Homer Patrick Godwin Jr.	93 ABC 0125	Reilly	05/13/93	
Alcoholic Bev. Control Comm. v. Mild & Wild, Inc., Sheila Scholz	93 ABC 1475	Nesnow	03/23/93	

COMMERCE

Lester Moore v. Weatherization Assistance Program	93 COM 0105	Gray	03/08/93	
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CRIME CONTROL AND PUBLIC SAFETY

George W. Paylor v. Crime Victims Compensation Comm.	91 CPS 1286	Morgan	04/27/93	
Steven A. Barner v. Crime Victims Compensation Comm.	92 CPS 0453	Nesnow	06/01/93	
Anthony L. Hart v. Victims Compensation Comm.	92 CPS 0937	Chess	03/01/93	
Jennifer Ayers v. Crime Victims Compensation Comm.	92 CPS 1195	Reilly	03/19/93	
Janie L. Howard v. Crime Victims Compensation Comm.	92 CPS 1787	Reilly	03/26/93	
Isabelle Hyman v. Crime Victims Compensation Comm.	92 CPS 1807	Morrison	05/24/93	
James G. Pellom v. Crime Control & Public Safety	93 CPS 0034	Gray	05/05/93	
Moses H. Cone Mem Hosp v. Victims Compensation Comm.	93 CPS 0152	Nesnow	04/02/93	8:3 NCR 327
Phillip Edward Moore v. Crime Control & Public Safety	93 CPS 0169	Nesnow	05/20/93	
John Willie Leach v. Crime Victims Compensation Comm.	93 CPS 0263	Morrison	05/20/93	
Nellie R. Mangum v. Crime Victims Compensation Comm.	93 CPS 0303	Morrison	06/08/93	
Constance Brown v. Crime Victims Compensation Comm.	93 CPS 0351	Reilly	05/24/93	

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Charles L. Wilson v. Environment, Health, & Natural Resources	91 EHR 0664	Morgan	03/23/93	
William E. Finck v. Environment, Health, & Natural Resources	92 EHR 0040	Gray	06/14/93	
Utey C. Stallings v. Environment, Health, & Natural Resources	92 EHR 0062	Gray	03/15/93	
Safeway Removal, Inc. v. Environment, Health, & Natural Res.	92 EHR 0826	West	03/12/93	8:1 NCR 83
Elizabeth City/Pasquotank Cty Mun Airport Auth v. EHN	92 EHR 1140	Gray	04/13/93	
Service Oil Company v. Environment, Health, & Natural Resources	92 EHR 1205	Reilly	05/27/93	
City of Salisbury v. Environment, Health, & Natural Resources	92 EHR 1472	Morrison	04/22/93	
Willie M. Watford v. Hertford Gates District Health Department	92 EHR 1600	Chess	03/24/93	
Standard Speciality Contractors, Inc. v. EHNR	92 EHR 1660	Reilly	05/21/93	
Angela Power, Albert Power v. Children's Special Health Svcs.	93 EHR 0008	Beeton	03/24/93	
Mustafa E. Essa v. Environment, Health, & Natural Resources	93 EHR 0146	Gray	03/29/93	
Rosetta Brimage, Vanessa Pack v. Env. Health of Craven County	93 EHR 0206	Nesnow	05/20/93	
O.C. Stafford/Larry Haney v. Montgomery Cty. Health Dept.	93 EHR 0224	Gray	06/07/93	
Bobby Anderson v. Environment, Health, & Natural Resources	93 EHR 0299	Reilly	06/07/93	
Shell Bros. Dist., Inc. v. Environment, Health, & Natural Resources	93 EHR 0308	Beeton	05/18/93	

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
HUMAN RESOURCES				
O.C. Williams v. Human Resources	91 CSE 0036* ²	Morgan	03/30/93	
Ronald Terry Brown v. Human Resources	91 CSE 0249	Morgan	05/17/93	
O.C. Williams v. Human Resources	91 CSE 1158* ²	Morgan	03/30/93	
Michael L. Ray v. Human Resources	91 CSE 1173	Morgan	05/17/93	
Randy Chambliss v. Human Resources	91 CSE 1187	Morgan	04/28/93	
Melvin White v. Human Resources	91 CSE 1192	Morgan	05/17/93	
Jefferson D. Boylen v. Human Resources	91 CSE 1217	Morgan	05/17/93	
Jeffery D. Williams v. Human Resources	91 CSE 1231	Morgan	04/28/93	
Samuel E. Massenberg Jr. v. Human Resources	91 CSE 1249	Morgan	05/17/93	
William A. Dixon v. Human Resources	91 CSE 1277	Morrison	03/04/93	
Gregory L. Washington v. Human Resources	92 CSE 0075	Morgan	04/01/93	
Edwin Clarke v. Human Resources	92 CSE 0129	Morgan	05/17/93	
Dwayne Allen v. Human Resources	92 CSE 0196	Morgan	03/31/93	
Edwin Ivester v. Human Resources	92 CSE 0268	Nesnow	03/30/93	
Tyrone Aiken v. Human Resources	92 CSE 1217	Gray	06/17/93	
Edward E. Brandon v. Human Resources	92 CSE 1237	Gray	04/16/93	
Darrell W. Russell v. Human Resources	92 CSE 1249	Becton	04/20/93	
John Henry Byrd v. Human Resources	92 CSE 1250	Reilly	06/04/93	
Michelle D. Mobley v. Human Resources	92 CSE 1256	Nesnow	04/15/93	
Robert E. Watson v. Human Resources	92 CSE 1265	Reilly	05/06/93	
Byron Christopher Williams v. Human Resources	92 CSE 1270	Nesnow	04/26/93	
James W. Bell v. Human Resources	92 CSE 1311	Nesnow	05/10/93	
Eric Stanley Stokes v. Human Resources	92 CSE 1316* ³	Reilly	03/25/93	
David Rollins v. Human Resources	92 CSE 1334	Morrison	05/06/93	
Lyndell Greene v. Human Resources	92 CSE 1346	Nesnow	04/16/93	
Leroy Snuggs v. Human Resources	92 CSE 1360	Morrison	04/15/93	
James P. Miller III v. Human Resources	92 CSE 1361	Gray	04/16/93	
Larry L. Crowder v. Human Resources	92 CSE 1396	Reilly	04/15/93	
Carlos Bernard Davis v. Human Resources	92 CSE 1404	Reilly	04/15/93	
Terrance Freeman v. Human Resources	92 CSE 1411	Mann	06/07/93	
Timothy Brian Eller v. Human Resources	92 CSE 1414	Reilly	04/20/93	
Charles S. Ferrer v. Human Resources	92 CSE 1416	Mann	04/15/93	
Ronald H. Lockley v. Human Resources	92 CSE 1418	Nesnow	04/20/93	
Rene Thomas Rittenhouse v. Human Resources	92 CSE 1421	Nesnow	04/20/93	
Thomas Edward Williamson v. Human Resources	92 CSE 1422	Reilly	04/20/93	
Roy Chester Robinson v. Human Resources	92 CSE 1423	Reilly	04/15/93	
William E. Ingram v. Human Resources	92 CSE 1450	Reilly	04/15/93	
Harold R. Pledger v. Human Resources	92 CSE 1455	Morrison	05/20/93	
Michael W. Bentley v. Human Resources	92 CSE 1512	Nesnow	06/09/93	
Dale Robert Stuhre v. Human Resources	92 CSE 1516	Reilly	05/11/93	
Tommy Malone v. Human Resources	92 CSE 1520	Mann	05/07/93	
James C. Dixon Jr. v. Human Resources	92 CSE 1522	Becton	05/11/93	
Wallace M. Cooper v. Human Resources	92 CSE 1527	Reilly	05/11/93	
Jarvis N. Price v. Human Resources	92 CSE 1531	Morrison	05/12/93	
Thomas L. Yates v. Human Resources	92 CSE 1535	Gray	05/10/93	
Robert E. Tarlton Sr. v. Human Resources	92 CSE 1536	Gray	05/17/93	
Rodney Devard Clemons v. Human Resources	92 CSE 1539	Gray	05/10/93	
James A. Coleman v. Human Resources	92 CSE 1540	Reilly	05/11/93	
Romeo F. Skapple v. Human Resources	92 CSE 1545	Gray	04/26/93	
Jeffrey L. Garrett v. Human Resources	92 CSE 1557	Gray	04/22/93	
William C. Hubbard v. Human Resources	92 CSE 1562	Mann	05/12/93	
Edward Fitch v. Human Resources	92 CSE 1572	Reilly	05/11/93	
Brian C. Gilmore v. Human Resources	92 CSE 1576	Gray	04/26/93	
Johnny W. Cooke v. Human Resources	92 CSE 1585	Becton	05/11/93	
Isaac Maxwell v. Human Resources	92 CSE 1589	Reilly	04/26/93	
Donald J. Ray v. Human Resources	92 CSE 1592	Mann	05/19/93	
McKinley Clyburn v. Human Resources	92 CSE 1623	Morrison	05/20/93	
Jeffery D. Williams v. Human Resources	92 CSE 1626	Mann	05/19/93	
Billy Smith v. Human Resources	92 CSE 1629	Reilly	03/25/93	
Anthony Curry v. Human Resources	92 CSE 1631	Reilly	03/25/93	
Larry W. Golden v. Human Resources	92 CSE 1633	Reilly	03/25/93	
William J. Carter v. Human Resources	92 CSE 1637	Nesnow	05/19/93	

* Consolidated cases.

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Eric Stanley Stokes v. Human Resources	92 CSE 1652 ^{*3}	Reilly	03/25/93	
Patrick Floyd v. Human Resources	92 CSE 1663	Reilly	05/20/93	
Ira Alston Jr. v. Human Resources	92 CSE 1703	Becton	06/16/93	
Marvin Holley v. Human Resources	92 CSE 1713	Mann	06/08/93	
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Leroy Jones v. Human Resources	92 CSE 1718	Gray	06/17/93	
James E. Blakney v. Human Resources	92 CSE 1779	Nesnow	05/13/93	
Barbara W. Catlett v. Human Resources	92 DCS 0577	West	03/15/93	
Laurel Langford v. Human Resources	92 DCS 1181	Gray	05/04/93	8:5 NCR 441
Ida Diane Davis v. Human Resources	92 DCS 1200	Gray	03/29/93	
Hatsuko Klein v. Human Resources	92 DCS 1271	Reilly	05/05/93	
Leon Barbee v. Human Resources	92 DHR 0658	Morrison	04/30/93	8:4 NCR 392
James H. Hunt Jr. v. Div. of Medical Assistance	92 DHR 1145	Becton	05/13/93	8:5 NCR 443
Barbara Jones v. Human Resources	92 DHR 1192	Nesnow	04/02/93	8:3 NCR 313
Joyce P. Williams v. Human Resources	92 DHR 1275	Gray	03/15/93	
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Samuel Benson v. Office of Admin. Hearings for Medicaid	93 DHR 0010	Becton	03/11/93	

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Carolyn M. Hair v. St Employees Comprehensive Major Medical	92 INS 1464	Chess	03/10/93
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Marilyn Jean Britt v. Criminal Justice Ed. & Training Stds. Comm.	92 DOJ 1088	Morrison	03/16/93
Tim McCoy Deck v. Criminal Justice Ed. & Training Stds. Comm.	92 DOJ 1367	Chess	04/01/93
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Sherri Ferguson Revis v. Sheriffs' Ed. & Training Stds. Comm.	92 DOJ 1756	Gray	03/23/93
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Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1066 ^{*4}	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1067 ^{*4}	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1068 ^{*4}	Mann	05/04/93	
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Larry G. Riddle v. Correction, Division of Prisons	92 OSP 1774	Gray	04/26/93	
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Clifton E. Simmons v. Correction	93 OSP 0159	Morrison	04/21/93	
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Jerry D. Doss Sr. v. Correction	93 OSP 0287	Gray	05/17/93	
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Mary Alyce Carmichael v. Bd/Trustees/Teachers' & St Emp Ret Sys	92 DST 1506	Chess	04/08/93

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UNIVERSITY OF NORTH CAROLINA HOSPITALS

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 DOA 0803

)
STAUFFER INFORMATION SYSTEMS,)
Petitioner,)
))
v.)
))
THE NORTH CAROLINA DEPARTMENT OF)
COMMUNITY COLLEGES AND THE NORTH)
CAROLINA DEPARTMENT OF ADMINISTRATION,))
Respondent,)
))
and)
))
THE UNIVERSITY OF SOUTHERN CALIFORNIA,)
Intervenor-Respondent.)
)

RECOMMENDED DECISION

STATEMENT OF THE CASE

On April 10, 1992, Respondents issued Request for Proposal 201157 for Applications Development Software for the North Carolina Department of Community Colleges ("the RFP"). (Exhibit 1). Stauffer submitted its Technical and Cost Proposals in response to the RFP to the Department of Administration (DOA) on May 11, 1992. (Exhibits 4 and 5). Technical and Cost Proposals were also submitted by the University of Southern California (USC). (Exhibits 2 and 3). Respondents determined that the proposal from Stauffer and the proposal from USC each met the technical requirements of the RFP. A technical proposal from a third bidder, System Builder Technologies (SBT), was found to be technically nonconforming. (Exhibit 8). On May 19, 1992, the Department of Community Colleges (DCC) determined that the low bid was submitted by USC. DCC determined that the USC bid was for \$175,200 and that the Stauffer bid was for \$192,650. (Exhibit 9).

Stauffer objected to the method of evaluating the proposals in a May 22, 1992 facsimile to King Prather, Assistant Purchasing Administrator for the Department of Community Colleges. (Exhibit 26). Stauffer contended that under correct and proper evaluation methods it was the low bidder. DOA responded to Stauffer's objection on May 28, 1992. (Exhibit 29). DOA admitted that a mistake had been made in evaluating the bids and reevaluated the proposals. Under the second and final DOA evaluation, the cost of the USC proposal was \$113,200, and the cost of the Stauffer proposal was \$114,100. (Id.).

Stauffer contended that the final evaluation method used by Respondents erroneously included certain costs in the Stauffer proposal that resulted in the higher total cost being assigned to the Stauffer proposal than to the USC proposal. Moreover, Stauffer contended that Respondents incorrectly determined that the USC proposal met the technical requirements of the RFP. Stauffer again protested, and a meeting was held between Stauffer and officials of DOA, including State Purchasing Officer William J. Stuckey, on June 15, 1992. (Tr., Vol. 3, pp. 386-387).

After this meeting resulted in no change in Respondent's position, Stauffer filed a verified petition and motion for stay on June 15, 1992. (Office of Administrative Hearings Case Number 92 DOA 0666). A hearing was held before Administrative Law Judge Thomas R. West on June 16, 1992, after which Judge West entered a temporary restraining order staying the administrative action on the grounds that Stauffer had demonstrated a likelihood of success on the merits and that Stauffer would be irreparably harmed if the stay were not entered. On June 29, 1992, a hearing was held on the motion to dismiss of the Respondents and

of the Intervenor USC. Judge West dismissed the petition on the grounds that, although there had been a final agency decision when the petition was filed, that decision had been subsequently retracted by Stuckey and there was no longer a final agency decision that would support a contested case petition.

Pursuant to Judge West's Order dismissing the petition, the parties had until July 15, 1992, to negotiate their dispute. Stauffer attempted to contact Stuckey by telephone, by letter, and by facsimile to continue negotiations, but Stuckey refused to have any contact with any official or representative of Stauffer. (Tr., Vol. 3, pp. 389-391). Stuckey issued his final decision on July 14, 1992, and upheld the decision of Respondents. (Exhibit 37; Tr., Vol. 3, p. 391). Stauffer then filed the verified petition that commenced the present contested case.

This case is daunting if viewed from the standpoint of deciding which software product is superior, TOADS or BLACKSMITH. That is not what this case is about.

This is a case about:

1. the law governing purchases by the State of North Carolina;
2. the meaning of the RFP at issue;
3. the understanding DCC had of the two bids at the time it accepted USC's bid;
4. the phrase, "their package" as it appears numerous times in the RFP;
5. a vague RFP, the terms of which cannot be understood in isolation, but must be understood in light of the RFP as a whole and the treatment by DCC of the same vague terms in separate bid packages; and
6. the credibility of witnesses and the analysis of conflicting evidence.

This is a case about whether TOADS, the same kind of product as BLACKSMITH, yet for proprietary reasons different from BLACKSMITH, met the requirements of the RFP and whether BLACKSMITH met the requirements of the RFP at a lower cost than TOADS.

Decisions made by the Executive Branch which become the subject of contested cases are analyzed pursuant to the standards set forth in G.S. 150B-23. A determination about whether a decision violates one of those five tests cannot be based upon evidence that the decisionmaker did not have, unless it is an update of that evidence.

The primary decisionmaker in this case was Mr. Ijames. This case is primarily about what was in his mind at the time the decision at issue was made. The case is not about what the expert witnesses say about the competing bids and software, except to the degree their testimony tends to support or detract from evidence of what was in Mr. Ijames' mind at the time the decision was made to accept USC's bid.

APPEARANCES

The Petitioner Stauffer was represented by M. Keith Kapp, Esq. and Richard N. Cook, Esq., of Maupin, Taylor, Ellis & Adams, P.A., Raleigh, North Carolina.

The Respondent DOA was represented by Teresa L. White, Assistant Attorney General, appearing on behalf of Attorney General Lacy H. Thornburg and, subsequently, Attorney General Michael F. Easley.

The Respondent DCC was represented by David M. Parker, Assistant Attorney General, and Anne J. Brown, Associate Attorney General, appearing on behalf of Attorney General Lacy H. Thornburg and, subsequently, Attorney General Michael F. Easley.

The Intervenor-Respondent USC was represented by Cynthia L. Wittmer, Esq. and Stephen D. Coggins, Esq., of Parker, Poe, Adams & Bernstein, Raleigh, North Carolina.

ISSUES

Did the USC bid submitted in response to DOA's Request for Proposal # 201157 ("the RFP") conform substantially with the terms of that RFP, within the meaning of N.C.G.S. § 143-52?

Did USC submit the lowest and best bid most advantageous to the State in response to DOA's Request for Proposal # 201157, within the meaning of N.C.G.S. § 143-52?

BURDEN OF PROOF

The Petitioner bears the burden of proving by the greater weight of the substantial evidence that USC's bid did not conform substantially with the terms of the RFP and that USC did not submit the lowest and best bid in response to the RFP.

OFFICIAL NOTICE

Official notice is taken of N.C.G.S. § 143-52, 1 N.C.A.C. 5A .0010, and 1 N.C.A.C. 1B .0700. Official notice is also taken of the contents of Volume I of the Federal Express Service Guide dated September, 1992, for shipments within the U.S. (also Exhibit P-P).

WITNESSES

The following persons were called by the Petitioner and testified:

1. Henry Unger
2. Charles Stauffer
3. Sasan Hober
4. Dianne Bozler
5. Nathan King Prather
6. Sasan Hober (on Rebuttal)

The following person was called by the Respondent DCC and testified:

1. Steve James

The following persons were called by the Respondent DOA and testified:

1. William Stuckey
2. Nathan King Prather

The following person was called jointly by the Respondent DOA and the Respondent DCC and testified:

1. Robin Burk

The following persons were called by the Intervenor-Respondent USC and testified:

1. Dianne Bozler
2. Alan Mehta
3. Dr. Edgar Sibley
4. David Jesus Amescua
5. E. Richard Strand

EXHIBITS

The exhibits were omitted from this publication. A copy of the exhibits can be obtained by contacting this office.

FINDINGS OF FACT

The Administrative Law Judge finds the following to be the facts, based upon consideration of the substantial evidence admitted; personal observation of the demeanor of the witnesses; and an analysis, through personal observation and analysis of contradictions and inconsistencies in the evidence, of the credibility of witnesses:

1. Steve Ijames is employed by DCC as Director of Information Services, a position he has held for eight years. (Tr., Vol. 7, p. 941.) Mr. Ijames holds a Bachelor of Science degree in mathematics, a Masters in Science in mathematics and a Masters in Science in computer science. (Tr., Vol. 7, p. 943.)

2. DCC's Information Services Section is divided into four units. (Tr., Vol. 7, p. 944.) One such unit, the Institutional Information Processing Systems section ("IIPS"), develops computer applications for use by the state's community colleges in performing administrative computing functions. (Tr., Vol. 7, pp. 944-945; 947-949.) Phil Shepard, who reports to Mr. Ijames, is in charge of IIPS. (Tr., Vol. 7, p. 945.)

3. The computer system maintained by Mr. Ijames' section, like most computer systems, is organized in layers. At the base of the system is the hardware--the computer itself--which, in the case of DCC, is a PRIME computer. (Tr., Vol. 7, p. 949.) The next layer is the operating software, which operates to manage the resources of the hardware and make them available to other programs that run on the hardware. (Tr., Vol. VII, pp. 303, 356-357.) On top of the operating software are a series of other software packages, such as database management or file management packages. These packages allow the user to structure and access information. Also at this level are language development tools, the software which translates programmers' directives into binary code for execution by the computer. (Tr., Vol. VII, pp. 303-304.) Among the software operating at this level at DCC is the PRIME INFORMATION software, including the structured query language of PRIME INFORMATION, known as INFORM. (Tr., Vol. VII, p. 955; Tr., Vol. VII, p. 358.)

4. Applications development software is a fourth generation computer language tool. It offers applications developers an easier, faster, more automated, and more uniform means of designing, developing, testing, implementing and maintaining software application systems. (Tr., Vol. 7, p. 946.) An applications development system makes use of the underlying levels of software but automates the logic involved in invoking the database management system or the hardware management capabilities of the operating system. (Tr., Vol. VII, pp. 305-306.)

5. Developers of applications development software must make numerous proprietary choices regarding the degree to which their systems rely on features of the underlying, operating software. Market and design considerations may dictate different choices concerning the degree to which they wish to override the capabilities of the underlying software and replace it with their own, or instead to invoke the capabilities of the underlying software in a more automated way. (Tr., Vol. VII, pp. 306-308, 403-404.) To some degree or another, however, any applications development software relies on the lower levels of software to accomplish its functions, and interacts with those lower levels. (Tr., Vol. VII, pp. 275, 306.)

6. For several years prior to issuance of the RFP, Mr. Ijames had known he needed to find a way to improve the efficiency with which his applications developers could develop, install, and maintain applications. Without an applications development system, DCC programmers were required to spend substantial time writing detailed computer code to meet DCC's applications needs. (Tr., Vol. 7, p. 947.)

7. In 1990, Mr. Ijames and Mr. Shepard began to research fourth generation products for possible acquisition by DCC to use on its PRIME system. (Tr., Vol. 7, p. 950.) They identified four

potential vendors whose products might be suitable: Stauffer, USC, System Builder Technology, Inc. ("System Builder"), and Infocell. (Tr., Vol. 7, p. 951.) Stauffer uses the trade name "BLACKSMITH" to describe its product line; USC uses the trade name "TOADS," an acronym for Total On-Line Applications Development System, for its product. (Tr., Vol. IX, p. 633.)

8. During this investigative period, Stauffer, USC and Infocell all demonstrated their products to Mr. Ijames and his staff. System Builder did not. (Tr., Vol. 7, p. 952.) Mr. Ijames had requested the demonstrations in an effort to ascertain whether an applications development tool would be helpful to DCC. (Tr., Vol. 7, pp. 952-953.) The applications development tool purchased had to be compatible with PRIME INFORMATION, the database management software used by DCC. (Tr., Vol. 7, pp. 955-956.)

9. Based upon the demonstrations, Mr. Ijames determined that several products could meet DCC's needs, including TOADS and BLACKSMITH. (Tr., Vol. 7, p. 955.) The IIPS team then developed specifications for an applications development tool, which Mr. Shepard compiled into one document and Mr. Ijames refined. (Tr., Vol. 7, pp. 957-59.)

10. Nathan King Prather is a purchasing administrator employed by DOA's Office of Purchase and Contract ("P&C"). He generally oversees purchases by state agencies of microcomputers, minicomputers and related peripheral products at a cost in excess of ten thousand dollars. (Tr., Vol. VI, pp. 153-154.)

11. In April, 1992, Mr. Prather issued Request for Proposals # 201157 (Exhibit 1) on behalf of DCC and DOA. (Tr., Vol. VI, p. 158.) Pages 6-11 of that document constitute the technical specifications developed by Mr. Ijames and his staff; pages 1-5 include standard terms and conditions prepared by P&C. (Tr., Vol. VI, pp. 154-155.) In response to the RFP, Mr. Prather received three proposals: from Stauffer, USC, and System Builder. (Tr., Vol. VI, p. 159.)

12. In evaluating the responses to the RFP, P&C employed a two-step process. Under this process, the technical proposals were evaluated first. If it was determined that a bidder's proposal met the technical requirements of the RFP, the bidder's cost proposal was then evaluated. (Tr., Vol. VI, p. 160.)

13. The RFP required bidders to submit one original and two copies of separately sealed cost and technical proposals, and one set of "user manuals" for each piece of equipment to be bid. (Exhibit 1, p. 2, n.7.) The RFP also required bids to be accompanied "by all information (including technical literature and specifications) necessary and pertinent to understand and evaluate" a bid proposal. (Exhibit 1, p. 6.)

14. As defined by the foregoing provisions of the RFP, a "bid" constitutes the sealed technical and cost proposals together with all user manuals. User manuals include such technical documentation as instruction manuals, tutorials, and release notes. Promotional literature or articles do not constitute part of the bid.

15. Dianne Bozler, Director of USC Software Systems, was responsible for preparing USC's proposal in response to the RFP. (Tr., Vol. IX, pp. 631, 643.)

16. Alan Mehta, an employee of USC who is supervised by Bozler, packed the box containing USC's bid documents for shipment from USC to DOA. (Tr., Vol. IX, pp. 643-644, 789.) He included three copies of USC's technical proposal and three copies of USC's cost proposal, placing each of the six proposals in separate envelopes. In addition, he included those documents entered into the record of this case as Exhibits D-1 and E, C-10, C-11.1, C-11.2, C-12, C-4, C-5, C-6.2, C-7, C-8 and C-9. (Tr., Vol. IX, pp. 791-794.) Mr. Mehta placed the documents into the box entered in this case as Exhibit P-E-3, added some packing material and signature pages, and shipped the box to DOA by Federal Express. (Tr., Vol. IX, pp. 794-797; Tr., Vol. 3, pp. 326-327.)

17. At the time the box containing USC's bid was shipped to DOA in May, 1992, USC used a Federal Express "Powership" scale to weigh packages shipped via Federal Express. (Tr., Vol. XI, p. 911.) The scale was calibrated so that if the weight of a package was at or up to seven ounces above a given pound

weight, the scale would record the weight at that pound weight on the shipping label. If the package exceeded any pound weight by eight ounces or more, the scale would round the package weight up to the next whole pound on the shipping label. (Tr., Vol. XI, p. 913.) When USC shipped its package to DOA, the shipping label produced by the Federal Express scale located at USC recorded the weight of the box at fifteen pounds. (Tr., Vol. 3, p. 359.)

18. During the course of the hearing, the Petitioner conducted weighing experiments intended to challenge USC's assertions as to the contents of the box containing USC's bid at the time it was shipped to DOA. (Tr., Vol. 3, pp. 335-350.) In response, USC conducted its own weighing experiments intended to support its testimony as to the contents of the box. (Tr., Vol. IX, pp. 698-709.) The weighing experiments conducted by the parties were not of scientific reliability, and do not rise to the level of substantial evidence.

19. USC's bid was comprised of USC's technical proposal (Exhibit P-E-1) and cost proposal (Exhibit P-E-2), and the following exhibits which constitute user manuals:

Exhibit P-E	Box set including P-D-2, P-D-3, and IR-C
Exhibit P-D-1	TOADS Developers Guide
Exhibit P-D-2	TOADS Programmers Guide
Exhibit IR-C	TOADS System Administrator Guide
Exhibit P-D-3	Index to System Administrator Guide
Exhibit P-C-10	TOADS Tutorial
Exhibit P-C-4	TOADS Release Note 9.2.RO
Exhibit P-C-5	TOADS Release Note 9.1.RO
Exhibit P-C-6.2	TOADS Release Note 9.0.RO
Exhibit P-C-7	TOADS Release Note 8.2.RO
Exhibit P-C-8	TOADS Release Note 8.0.R2
Exhibit P-C-9	TOADS Release Note 7.5

In addition, the USC bid was accompanied by the following items of descriptive literature which did not constitute part of the bid:

Exhibit P-C-11.1	TOADS Promotional packet
Exhibit P-C-11.2	TOADS Promotional packet
Exhibit C-12	TOADS Promotional article

20. Mr. Prather opened the bids received in response to the RFP on May 11, 1992. He examined each shipment and verified that the technical proposals did not include cost information and that the bidders had submitted supporting technical documentation. (Tr., Vol. VI, p. 159.) Mr. Prather then sent the technical proposals and documentation from each bidder to DCC, keeping a single copy of each technical proposal and all sealed cost proposals in his office. (Tr., Vol. VI, pp. 159-160.)

21. Mr. Ijames and Mr. Shepard evaluated the technical proposals sent to DCC by Mr. Prather to determine whether the respective vendors had submitted proposals which substantially met the RFP's specifications. (Tr., Vol. 7, pp. 962-963.) Mr. Ijames had the ultimate responsibility to decide whether a proposal substantially complied with the RFP. (Tr., Vol. 7, p. 967.)

22. In evaluating each proposal, Mr. Ijames and Mr. Shepard used an evaluation sheet which listed each of the RFP's requirements and contained space for written comments about a proposal's compliance with each such requirement. Both men completed such sheets for the USC and Stauffer proposals. (Tr., Vol. 7, pp. 963, 966; Exhibits 15, 17.) After each had evaluated a proposal individually, they then met to review their notes and the proposal together. (Tr., Vol. 7, pp. 968-969.)

23. Mr. Shepard evaluated the System Builder proposal before Mr. Ijames and concluded that the proposal did not meet the technical requirements of the RFP for several reasons. He informed Mr. Ijames that the System Builder proposal was nonconforming, and Mr. Ijames agreed. Therefore, Mr. Ijames did not

complete an evaluation sheet for the System Builder bid. (Tr., Vol. 7, p. 964.) The System Builder proposal was rejected because it relied upon the underlying software to meet the recovery requirements of the RFP. In a memo dated May 15, 1992, from Shepard to Jane Goodwin, Director of Departmental Services for DCC, Shepard found that SBT failed to meet the recovery requirement.

"They do not provide recovery features within their package but rely on the recovery features that are residing on the different hardware/software platforms."

(Exhibit 8). Ijames agreed with this analysis at the time it was made. (Testimony of Stephen Ijames, Tr., Vol. 7, p. 904; Vol. VI, p. 102).

DCC did not have the optional recovery features on its underlying PRIME INFORMATION software. (Tr., Vol. VI, pp. 119, 126; Tr., Vol. XIV, pp. 1594-1595.)

24. DCC's analysis of the System Builder proposal is the key to this case. Stauffer contends that DCC rejected the System Builder bid because it did not have the recovery features within its own proprietary package. Thus, restrictive interpretation of "their package" is warranted. Respondents argue that the phrase "their package" used in the RFP should not be read so restrictively and that an application development software package complies with the RFP if the proprietary package itself contains features required by the RFP or accomplishes certain functions by facilitating the underlying software.

Stauffer argues that DCC intended a restrictive interpretation of "their package" in the RFP when, in Shepard's memo, it rejected System Builder because its package relied on the recovery features residing on the different hardware/software platforms. Stauffer correctly argues that no mention was made, at the time the memo was written, that DCC did not have the optional recovery features on its underlying PRIME INFORMATION software. Stauffer argues that DCC and DOA are bootstrapping the decision to choose TOADS with Ijames' testimony that DCC did not have the optional recovery features.

Stauffer's arguments have the attraction of being simple and ascribing importance to the exactness of language, to wit: DCC did not mention that its underlying software lacked the optional recovery features, so it must have meant exactly what it said in Shepard's memo and Ijames was merely bootstrapping (or lying) at the hearing.

Shepard's memo is capable of another interpretation, however. Shepard and Ijames knew the capabilities of DCC's PRIME INFORMATION software and knew it lacked the optional recovery features. When System Builder's bid did not provide the features within its own package, the result was that the features were not provided at all. The attraction of this analysis is that it is consistent with knowledge that Ijames and Shepard had and makes DCC's analysis of the three proposals consistent rather than the analysis of System Builder mutually inconsistent with its analysis of the USC proposal.

The Shepard memo must be construed in light of the knowledge that Shepard and Ijames had at the time it was written. Rejection of the System Builder bid is consistent with acceptance of the USC bid. The phrase "their package" used repeatedly in the RFP does not mean the proprietary package of the vendor standing alone.

25. If a particular bidder decided, for proprietary reasons, to accomplish a certain function by relying in part on the underlying software, Ijames treated that function as part of the bidder's package and considered the bid compliant, as long as the function could be performed as required by the RFP. (See discussion of delayed indexing and null field delimiting below.) The RFP itself specifies that a bidder's software is to be "evaluated on how well their package operates in the PRIME INFORMATION environment," in conjunction with the underlying PRIME hardware and PRIME INFORMATION software used by DCC. (Exhibit 1, p. 7, ¶ 1 [emphasis added]; see generally, Exhibit 1, pp. 6-7.)

26. Mr. Shepard informed DCC Purchasing Officer Jane Goodwin, who in turn notified Mr. Prather, that DCC had found the technical proposals of both USC and Stauffer conforming. (Tr., Vol. VI,

pp. 160-161; Exhibit 8.) Mr. Prather then released the cost proposals of these two bidders to DCC. (Tr., Vol. VI, p. 161.)

27. Based on his evaluation of the cost proposals, Mr. Ijames determined that USC had submitted the lowest and best proposal, at a cost of \$175,200 compared to a cost of \$192,650 for Stauffer's proposal. (Tr., Vol. 7, pp. 969, 1052.) Mr. Shepard communicated that determination to Ms. Goodwin, who again notified Mr. Prather of DCC's determination. (Tr., Vol. VI, pp. 161-162.) Mr. Prather reviewed DCC's cost analysis, determined that some costs beyond the initial one-year contract term had been improperly included, and adjusted the cost analysis. (Tr., Vol. VI, pp. 162-164, 168-169; Tr., Vol. VII, p. 206.) USC, however, remained the low bidder with a bid of \$113,200. (Tr., Vol. VI, p. 178; Exhibit 22.) In evaluating the cost of Stauffer's proposal, DCC and DOA included the cost of Stauffer's BLACKSMITH Security system at \$12,000, and the cost of Stauffer's Developer II and System Administrator training classes at \$6,400 and \$3,000, respectively. (Tr., Vol. 7, pp. 1048, 1050; Exhibit 5, pp. 4, 6; Tr., Vol. VI, pp. 180-181.) DOA awarded the contract to USC on May 21, 1992. (Tr., Vol. VI, p. 170; Tr., Vol. VII, pp. 201-202.)

28. Stauffer questioned the award of the contract to USC by letter to Mr. Prather dated May 22, 1992. (Tr., Vol. VI, p. 175; Exhibit 26.) As a result, Mr. Prather met with Mr. Ijames, Mr. Shepard, and Ms. Goodwin to again review the analysis of the proposals. (Tr., Vol. VI, pp. 175-176.) Stauffer's cost proposal was again revised, but its bid remained higher than USC's at a cost of \$114,100. (Tr., Vol. VI, pp. 176-180.) Mr. Prather explained his analysis in a letter to Stauffer dated May 28, 1992. (Exhibit 29.)

29. USC first received notification of the contract award on June 1, 1992. (Tr., Vol. IX, p. 644.) Subsequently, Stauffer protested the contract award to the State's Purchasing Officer, William Stuckey. (Tr., Vol. 7, pp. 925, 928, 933.)

30. During the course of the hearing, Ms. Robin Burk was qualified and testified for DCC and DOA as an expert in commercial software, writing and reviewing government RFPs, and responding to RFP's for government contract bidding. (Tr., Vol. VII, pp. 258-259, 301.) Dr. Edgar Sibley was qualified and testified for USC as an expert in commercial software, including applications development software, database design, system administration, security, and the teaching of those topics; drafting, reviewing, and evaluating government RFPs; and writing and evaluating responses and bids to government RFPs. (Tr., Vol. XII, pp. 1045-1046, 1069.) Mr. Henry Unger was qualified and testified as an expert in commercial software, requests for proposals, and responses to requests for proposals in government contract bidding for computer software. (Tr., Vol. 1, pp. 38, 84.)

31. The Petitioner disputes DCC's determination that USC's proposal complied with the RFP's technical requirements in the areas of security, user interface support, indexing, and tracking of changes. In addition, the Petitioner contends that the costs of its automated security system and of two of its training classes were improperly included in evaluating the Stauffer proposal, and that it in fact presented the lowest bid.

I. **USC'S COMPLIANCE WITH THE TECHNICAL REQUIREMENTS OF THE RFP.**

A. **User Interface Support.**

32. The RFP included the following relevant requirements regarding user interface support:

Comprehensive and easy-to-use interface features are a key ingredient of an Applications Development Software package. The required features that we are interested in are: . . . (7) Bottom screen prompting, . . . [and] (9) Dumb terminal windowing. . . .

(Exhibit 1, p. 9.) "Ease of use" is a subjective factor which can depend upon many considerations, such as frequency of use, what the feature is being compared to, and the needs of the user, as acknowledged by Stauffer's witnesses. (Tr., Vol. 2, p. 180; Tr., Vol. 6, p. 784.) The RFP did not preclude writing some code (or programming) to accomplish user interface support. (Exhibit 1, p. 9.)

33. "User interface support," as used in the RFP, referred to those facilities supported by the applications development tool to enable the applications developer to build interface methods between the computer and the user. (Tr., Vol. 7, p. 972). On his written evaluation form, Mr. Ijames found that USC's proposal supported all eleven of the required user interface features, noting that TOADS "uses callable routines for some of the interface features." (Exhibit 17, p. 4.)

(I) Bottom screen prompting.

34. Bottom screen prompting is a method of communicating instructions or "prompts" to, and receiving input from, the computer user at the bottom of the computer terminal screen.

35. USC's technical proposal included the following response to the bottom screen prompting requirement:

TOADS incorporates easy-to-use features for both users and programmers/developers. . . . (7) Bottom screen prompting can be achieved through the use of a custom written universal subroutine. . . . (Exhibit 2, p. 9.)

36. Mr. Ijames understood USC's proposal to mean that DCC could write one simple TOADS subroutine, and thereafter use that subroutine universally in the TOADS environment to effect bottom screen prompting. (Tr., Vol. 7, pp. 974-975.) Mr. Ijames defined a universal subroutine as a subroutine that is written and then made universally available through the applications development tool to all applications developers. (Tr., Vol. 7, p. 974.) Stauffer's President, Charles Stauffer, acknowledged that one purpose of a subroutine is to collect programming instructions in one place so they can be used repeatedly without the necessity of physically re-programming the instructions each time. (Tr., Vol. 6, p. 783.)

37. Mr. Ijames reasonably found that USC's proposal substantially complied with the RFP's requirement for bottom screen prompting. Mr. Ijames also reasonably determined that USC's proposal substantially satisfied the RFP's ease of use requirement for bottom screen prompting, since it provided for a universally-available, callable subroutine which eliminated the necessity of re-programming the instructions for bottom screen prompting each time the feature was desired. (Tr., Vol. 7, pp. 974-975.)

38. The testimony of two of the expert witnesses, Ms. Robin Burk and Dr. Edgar Sibley, confirmed that bottom screen prompting can be easily accomplished through use of TOADS' universal subroutines. (Tr., Vol. VII, pp. 341-342; Tr., Vol. XII, pp. 1082-1084, 1214-1217.) Ms. Bozler and Dr. Sibley further explained how the user manuals submitted as part of USC's proposal show how a universal subroutine for bottom screen prompting can be written once, and TOADS will then, if desired, apply it automatically to all fields, thereby minimizing the involvement of the programmer. (Tr., Vol. IX, pp. 664-667; Tr., Vol. XII, pp. 1216-1217.)

(2) Dumb terminal windowing.

39. "Windowing" is a form of user interface where a rectangular sub-area of the screen is used to display information to or receive input from a user. The rectangular area or "window" is typically delineated from the rest of the screen by use of a line or by reverse video features (contrasting light and dark areas). (Tr., Vol. 7, p. 978; Tr., Vol. 6, p. 792; Tr., Vol. XII, pp. 1223-1224.)

40. Dumb terminal windowing is the ability to create a window or the effect of a window on a "dumb" terminal--a terminal which has little or no intelligence of its own and may not in and of itself have the capacity to support windowing. (Tr., Vol. 7, p. 978.)

41. USC responded to the RFP's requirement for dumb terminal windowing as follows:

Dumb terminal windowing is available dependent upon the limits of the terminal in question. Certain characters are required for TOADS to draw line graphics. If the terminal does not support line

graphics, TOADS graphics will appear in reverse video. (Exhibit 2, p. 9.)

42. Mr. Ijames understood USC's proposal to mean that TOADS supported dumb terminal windowing. In the remainder of the response, he understood that USC was simply explaining how it accomplishes that function. (Tr., Vol. 7, p. 979.)

43. Mr. Stauffer acknowledged that the means by which both TOADS and BLACKSMITH accomplish dumb terminal windowing are dependent upon the limits of the terminal in question. If the terminal does not support line graphics, both packages use reverse video features to delineate the window; if the terminal does not support reverse video, both packages use a string of symbols to create the effect of a line. (Tr., Vol. 6, pp. 794-798.) Thus both products accomplish dumb terminal windowing in the same fashion, as indicated by the proposals.

44. Mr. Ijames reasonably found that USC's proposal substantially complied with the requirements of the RFP for dumb terminal windowing. The testimony of Ms. Burk and Dr. Sibley, with references to the TOADS user manuals, confirmed Mr. Ijames' conclusion. (Tr., Vol. VII, pp. 344-347; Tr., Vol. VIII, pp. 474-479, 542-546; Tr., Vol. XII, pp. 1083-1084, 1225-1228.)

B. **Change Tracking.**

45. The RFP included the following requirement for tracking of changes to software applications:

This feature is considered a required part of an Applications Development Software package. Vendors must provide complete information on the availability of this feature in their package. (Exhibit 1, p. 9.)

46. Tracking of changes to applications development software involves recording any modifications to the system in order to create a history of the evolution of any application of the system. (Tr., Vol. 7, p. 981.) Mr. Ijames included this requirement because DCC wanted to have the ability to maintain a record of changes made to the software, including systems and applications files. (Tr., Vol. VI, pp. 69, 71.)

47. USC's proposal included the following information on change tracking:

As an add-on product to TOADS, a software control and archiving system (SCATS) will be available by October 1, 1992. This product, currently under beta testing, will enable developers to install applications into a production environment and maintain a history on the installation of the application. It will also maintain an archive of all developed applications, project by project, for as long as required. . . . (Exhibit 2, p. 10.)

48. In stating that SCATS would be available by October 1, 1992, USC failed to respond to the RFP's change tracking requirement.

49. Mr. Ijames, however, determined that TOADS met the change tracking requirement without relying upon the "SCATS" product described by USC in its Technical Proposal. (Tr., Vol. 7, p. 1091.) On his written evaluation form, Mr. Ijames noted that SCATS would not be available until October of 1992. (Exhibit 17, p. 5.) He also noted, however, that the TOADS audit tracking feature, described in the user manuals which were part of USC's bid (Exhibit IR-C, Ch. 7, pp. 5-6, and App. B, p. iii; Exhibit P-D-1, App. A, p. i), could be used to track files such as the master file (PROCESS.MASTER) prior to the availability of SCATS. (Tr., Vol. 7, pp. 984-986.) Mr. Ijames understood from demonstrations of the TOADS product prior to issuance of the RFP that the audit trailing feature could be turned on both applications files and systems files, as confirmed by the TOADS user manuals. (Tr., Vol. 7, pp. 985-986, 988-989; Tr., Vol. IX, pp. 695-697; Tr., Vol. XII, pp. 1100, 1102.)

50. Mr. Ijames was also aware, as described in the TOADS' user manuals (Exhibit P-D-2, App.

A, p. i), that programmers could track changes in TOADS through use of the comment section in the header or template of the TOADS universal subroutines, where a programmer can record when and why modifications to applications are made and describe such changes. (Tr., Vol. 7, pp. 990-991, 1091.)

51. Mr. Ijames reasonably concluded that USC's proposal substantially met the RFP's requirement for tracking of changes. The testimony of both Ms. Burk and Dr. Sibley supported his conclusion. (Tr., Vol. VII, pp. 380-385; Tr., Vol. XII, pp. 1099-1103.)

C. **Indexing.**

52. The RFP included the following relevant requirements for indexing:

Vendors are to provide complete information on the indexing capabilities that are found in their Applications Development Software package. The following indexing capabilities are required: . . . (6) Delayed indexing, (7) INFORM level support and (8) Delimiters (Null fields, date, browse retrieval, data telescoping). (Exhibit 1, p. 9.)

The RFP did not specify how these indexing features were to be accomplished.

53. DCC required vendors to describe indexing features available with their package because indexing is the method by which records in a database system are stored and subsequently accessed or retrieved. Indexing is a necessary tool in building database management systems. (Tr., Vol. 7, pp. 995-996; Tr., Vol. VII, pp. 349-351.) "Alternate key" is an equivalent term for "index." (Tr., Vol. 7, p. 1003; Tr., Vol. VII, p. 350; Tr., Vol. XII, pp. 1237-1238.)

54. USC's proposal made the following statement regarding indexing:
TOADS indexing supports the following types of alternate keys to files:

- 1) B-tree access (including partial key lookup);
- 2) regular cross reference inverted lists;
- 3) PRIME INFORMATION's alternate keys;
- 4) range edits with low and high values defined per item;
- 5) memory files for efficient table lookup without a read to disk;
- 6) intersecting alternate keys which allow users to build any combination of alternate keys for rapid retrieval of records.
- 7) the ability to scroll through alternate key selections--forward, backward, marking items for inclusion--or exclusion--in a select list, the ability to browse through each record marked for inclusion in the browse, and the option of printing directly from the selected list and, finally,
- 8) INFORM level is supported through the TCL support of TOADS.

On each alternate key retrieval, TOADS displays the total number of records in the database meeting the selection criteria and displays 10 record summaries at a time. As users page through the summaries, they mark records to be displayed in full detail at a later time. When ready, they then can browse through the marked summary records for details. (Exhibit 2, pp. 10-11.)

- (1) **Delayed indexing.**

55. Delayed indexing is the ability to delay updating the computer system's indexes at the time a record is stored; it is a method by which the computer's processing resources needed to update the indexes are reserved until a later time. (Tr., Vol. 7, pp. 996-997; Tr., Vol. VII, pp. 349-351.) Mr. Ijames testified that the reference to delayed indexing in the RFP referred to the concept of being able to delay indexing, without implying that any particular method to accomplish such delayed indexing was required. (Tr., Vol. 7, pp. 1053-1054.)

56. As explained in the TOADS user manuals, TOADS provides for the automatic updating of indexes. (Exhibit P-C-8, ¶¶ 13, 14; Tr., Vol. VIII, p. 497.) However, if a programmer chooses not to organize the data in such a fashion, then TOADS allows someone with proper permission to "drop down to level three" and access PRIME INFORMATION's alternate keys, with its ability to delay the updating of those alternate keys or indexes. (Tr., Vol. VIII, pp. 497-498.) It is commonly understood by PRIME users that PRIME INFORMATION's alternate keys offer delayed indexing. (Tr., Vol. VII, p. 416; Tr., Vol. IX, p. 673.)

57. USC stated in its proposal that TOADS "supports...PRIME INFORMATION's alternate keys. . . ." Mr. Ijames understood that this support would enable DCC programmers to delay indexing through access to the delayed indexing feature of PRIME INFORMATION's alternate keys, in compliance with the RFP. (Tr., Vol. 7, pp. 998-999, 1000, 1097; Tr., Vol. VI, p. 109.) Because TOADS supports, or allows access to, PRIME INFORMATION's alternate keys with its delayed indexing feature, delayed indexing can then be accomplished within TOADS; the feature therefore becomes part of the TOADS package. (Tr., Vol. XII, p. 1244; Tr., Vol. 6, pp. 803-804; Tr., Vol. VII, pp. 306-308; Tr., Vol. XIII, pp. 1352-1353.)

58. Mr. Ijames reasonably determined that USC's proposal substantially complied with the RFP's requirement for delayed indexing through TOADS' support of PRIME INFORMATION's alternate keys, since support of PRIME INFORMATION's alternate keys provided access to PRIME INFORMATION's delayed indexing feature.

59. Both Ms. Burk and Dr. Sibley explained in detail, by reference to the user manuals submitted as part of USC's bid, how delayed indexing is accomplished in TOADS in conjunction with PRIME INFORMATION's alternate keys, confirming the reasonableness of Mr. Ijames' conclusion. (Tr., Vol. VIII, pp. 497-499; Tr., Vol. XII, pp. 1084-1085, 1237-1242, 1258, 1262-1263; Tr., Vol. XIII, pp. 1352-1353.) Further, Ms. Bozler and Dr. Sibley also referred to the TOADS user manuals to explain how delayed indexing could be accomplished in all of TOADS' indexing systems, even without reliance upon PRIME INFORMATION's alternate keys. (Tr., Vol. IX, pp. 739-740, 753-755, 765; Tr., Vol. XII, pp. 1240-1243, 1256.)

(2) INFORM level support.

60. USC responded to the RFP requirement for INFORM level support as follows:

8) INFORM level is supported through the TCL support of TOADS. (Exhibit 2, p. 11.)

Mr. Ijames understood this assertion to mean that INFORM level is supported. (Tr., Vol. 7, p. 1001.)

61. INFORM is a set of commands available in the PRIME INFORMATION software which can be used interactively by a user to construct a query against a database, in contrast to using a preconstructed program. (Tr., Vol. VII, pp. 363-364.)

62. As described in more detail in the user manuals, TOADS gives the applications programmer the option to allow an application user to go beyond preconstructed programs and access some of the commands of the underlying PRIME INFORMATION software. (Tr., Vol. VII, p. 364.) Among such underlying commands are the INFORM commands which can be used to withdraw information from the database. (Tr., Vol. VII, p. 364.)

63. Mr. Ijames reasonably concluded that USC's proposal substantially met the RFP's requirement for INFORM level support. His conclusion was supported by the testimony of Ms. Burk and Dr. Sibley. (Tr., Vol. VII, pp. 363-364; Tr., Vol. XII, pp. 1087-1088.) By reference to the user manuals submitted as part of USC's bid, Dr. Sibley explained in detail three different ways by which TOADS provides INFORM support by allowing data retrieval with the use of INFORM verbs. (Tr., Vol. XII, pp. 1087-1088; Tr., Vol. XIII, pp. 1367-1368, 1372.)

(3) Delimiters.

64. Delimiters are mechanisms for restricting the number or kinds of records retrieved from a database. (Tr., Vol. 7, p. 1001.) Hundreds of delimiters or delimiting functions are possible. (Tr., Vol. IX, p. 678.) The RFP included four examples of delimiters or delimiting functions: null fields, date, browse retrieval, and data telescoping. (Exhibit 1, p. 9.) Although the four examples of delimiters set out in the RFP were an illustrative rather than an exhaustive list of the required delimiters, at least those four delimiters or delimiting functions were required.

65. USC did not specifically respond to each example in its technical proposal. (Tr., Vol. IX, p. 678.) Rather, USC described the general delimiting capabilities of TOADS in its technical proposal; examples of specific delimiters can be found in the user manuals submitted with its bid.

(a) Null field delimiting.

66. A null field is a field that is empty and has no data in it. (Tr., Vol. 7, p. 1003; Tr., Vol. VII, p. 366.) Null field delimiting is the ability to restrict access to or search a database based upon null or empty fields. (Tr., Vol. XII, p. 1089.)

67. USC's proposal stated that TOADS supports PRIME INFORMATION's alternate keys, and PRIME INFORMATION's alternate keys provide null field support. (Tr., Vol. 7, p. 1003.) Mr. Ijames, because of his experience with PRIME INFORMATION, knew that PRIME INFORMATION's alternate keys provide null field support. (Tr., Vol. 7, p. 1003.) Because TOADS allows access to PRIME INFORMATION's null field delimiting feature, it is available or useable within TOADS; the feature therefore becomes part of the TOADS package.

68. Mr. Ijames reasonably concluded that USC's proposal substantially met the RFP's requirement for null field delimiting by allowing access to the null field delimiting feature of PRIME INFORMATION's alternate keys.

69. The testimony of both Ms. Burk and Dr. Sibley supported Mr. Ijames' conclusion. (Tr., Vol. VII, p. 366-368; Tr., Vol. XII, p. 1092.) Moreover, as explained by both Ms. Burk and Dr. Sibley, the TOADS user manuals submitted with USC's bid further show that searches can be made in TOADS of "blank" fields. (Tr., Vol. VII, pp. 372-373; Tr., Vol. XII, pp. 1089-1092; Exhibit P-C-6.2.) Since blank fields are the same as null fields, searching for blank fields in TOADS also accomplishes null field delimiting. (Tr., Vol. VIII, pp. 509, 550; Tr., Vol. XII, p. 1092; Tr., Vol. XIII, pp. 1364-1365.)

(b) Date delimiting.

70. Date delimiting refers to the ability to access or retrieve data based on date. (Tr., Vol. VII, p. 368; Tr., Vol. XII, pp. 1089-1090.)

71. Mr. Ijames found that USC's proposal met the RFP's requirements for date delimiting through the "XCLUDE" keys routine described in the user manuals. (Exhibit P-D-1, Ch. 3; Tr., Vol. 7, p. 1005.) Mr. Ijames concluded that the XCLUDE keys routine can be utilized to delimit a database in any way a designer desires, including by date. (Tr., Vol. 7, pp. 1005-1006.) Mr. Ijames had learned of the XCLUDE keys function during demonstrations of TOADS by USC prior to issuance of the RFP, and therefore knew to look for this function in the TOADS manuals in evaluating USC's bid. (Tr., Vol. 7, p. 1006.)

72. Mr. Ijames reasonably determined that USC's proposal provided for date delimiting through the XCLUDE key routine, in substantial compliance with the RFP, as confirmed by the testimony of both Ms. Burk and Dr. Sibley. (Tr., Vol. VII, pp. 368-369; Tr., Vol. XII, p. 1090. By reference to the TOADS user manuals, Ms. Bozler and Dr. Sibley further explained that, in TOADS, an alternate key or index can be placed on any data field, and thus can then be used to delimit even without use of XCLUDE. (Tr., Vol. IX, p. 686; Tr., Vol. XIII, pp. 1364-1366.) Appendix E of the TOADS Developers Guide (Exhibit P-D-1, App. E, p. xxvii) specifically illustrates the use of birth date as a delimiter. (Tr., Vol. IX, pp. 686-687; Tr., Vol. XII, p. 1090; Tr., Vol. XIII, pp. 1365-1366.)

(c) Browse retrieval.

73. The Petitioner conceded at hearing that USC's proposal provided for browse retrieval delimiting, as required by the RFP. (Tr., Vol. 6, p. 815.)

(d) Data telescoping.

74. Mr. Ijames testified that "data telescoping" in the RFP referred to the ability to take a data set and to successively narrow or refine the data within it to compute upon. (Tr., Vol. 7, p. 1007.)

75. Mr. Ijames determined that USC's proposal provided for data telescoping by its description of TOADS' ability:

to scroll through alternate key selections -- forward, backward, marking items for inclusion - - or exclusion -- in a select list, the ability to browse through each record marked for inclusion in the browse, and the option of printing directly from the selected list (Tr., Vol. 7, pp. 1007-1008, Exhibit 2, p. 11.)

This language from USC's proposal indicated to Mr. Ijames that a subset or "select list" of the full database could be created in TOADS and, once created, the subset could then be further refined by additional data retrieval from the select list rather than from the full database. (Tr., Vol. 7, pp. 1008-1010, 1059-1060, 1089.)

76. Stauffer's Vice-President for Sales, Sasen Hober, defined data telescoping as the ability to change levels of detail or shift perspectives within a data set. (Tr., Vol. 3, p. 375; Tr., Vol. 4, p. 492.) "Data telescoping", however, is not an industry standard term, and neither Ms. Burk nor Dr. Sibley could define it. (Tr., Vol. VII, p. 374; Tr., Vol. XII, p. 1093.)

77. Ms. Bozler was not certain what was meant by the phrase "data telescoping" when USC responded to the RFP, and did not expressly use the term in USC's proposal, although she attempted to describe the function she believed was being requested. (Tr., Vol. IX, p. 688.) Mr. Ijames was not concerned whether a proposal repeated the words of the RFP, but was interested in whether the function could be performed. (Tr., Vol. 7, p. 1009.)

78. Mr. Ijames reasonably concluded that USC's proposal provided for data telescoping, as he intended the term to be understood, in substantial compliance with the RFP. His conclusion is supported by the testimony of Ms. Burk and Dr. Sibley, who described in more detail, by reference to the TOADS user manuals, how the function of data telescoping, as defined by Mr. Ijames, is accomplished in TOADS through the creation of select lists. (Tr., Vol. VII, pp. 374-375, 378; Tr., Vol. XII, pp. 1096-1097.) They further testified that the TOADS user manuals demonstrate that TOADS also accomplishes the function of data telescoping as defined by Ms. Hober. (Tr., Vol. VII, pp. 375-378; Tr., Vol. IX, pp. 690-692; Tr., Vol. XII, pp. 1097-1099; Exhibit P-D-1, pp. 1-5, 3-1 to 3-6, App. E., p. xxvi.)

D. Security.

79. The RFP included the following requirements for security:

Security against unauthorized access, the capability to set security and the ease of setting security are all highly important issues. The following security features are required: (1) User level security, (2) Account level profile, (3) Process level security, (4) File level security, (5) Record level security, (6) Field level (view blocking), (7) Pseudo TCL access, (8) Pseudo TCL level security, (9) INFORM field security and (10) INFORM command security. Vendors must indicate the security features available through use of their package.

(Exhibit 1, p. 8.)

The RFP did not preclude writing some code to achieve security in the ten required areas.

80. Stauffer does not contend that USC's proposal failed to provide for security in the first eight of the ten enumerated areas. (Tr., Vol. 2, pp. 164-165.) Stauffer does contend, however, that USC's proposal did not meet the RFP's requirements for security in the last two of the ten areas, and that USC's security system is not easy to use.

81. In response to the RFP's security requirements, USC offered its security system, "TASS":

Security within TOADS is extensive without being complex and has been able to meet the diverse needs of our customers. The TOADS Application Security System (TASS) controls and limits access to system functions based upon a user's privileges . . . TASS can be used with TOADS, or with programs unrelated to TOADS. . . (Exhibit 2, p. 5.)

USC's proposal then described how it met each of the ten required security features. (Exhibit 2., pp. 5-7.) With regard to the last two features, USC's proposal stated:

9) INFORM field security and

10) INFORM command security have been controlled by TOADS through our TOADS Report Writer component. . . . (Exhibit 2, p. 6.)

82. USC's proposal expressly addressed each of the ten enumerated security areas, and explained that INFORM field and command security are handled through the TOADS Report Writer. (Exhibit 2, pp. 5-7.) Mr. Ijames understood that some coding could be required with TASS, depending upon the particular security features being implemented, but anticipated that DCC would need to write some code with any security system in order to meet its particular needs. (Tr., Vol. VI, pp. 11-13, 110, 113-114.) Mr. Ijames also understood that ease of setting security in TOADS' TASS is facilitated by pre-existing menus generic to TASS that guide the developer through the process of setting security, and by access to the TOADS universal subroutines to customize certain security features. (Tr., Vol. VI, pp. 110-111, 113-114, 125-126.)

83. Mr. Ijames reasonably concluded that USC's proposal substantially met the RFP's security requirements in the ten enumerated areas. His conclusion in the areas of INFORM field and command security was supported by the testimony of Dr. Sibley, who explained in detail, by reference to the TOADS user manuals, how those security features are accomplished by the TOADS Report Writer. (Tr., Vol. XII, pp. 1207-1211; Tr., Vol. XIII, pp. 1281-1286, 1356-1358.) The TOADS Report Writer simulates the report writer function of INFORM and passes requests to INFORM; since these requests are returned to the user through TOADS, they are therefore subject to TOADS' security capabilities. (Tr., Vol. XII, p. 1208; Tr., Vol. XIII, pp. 1285-1286, 1356-1357.)

84. Mr. Ijames reasonably concluded that USC's proposal substantially met the ease of use requirement of the RFP. TASS is a virtually fully automated system, but allows the programmer to override the automated features for further customization. (Tr., Vol. VI, pp. 113-114; Tr., Vol. VII, p. 571.) At the most detailed security levels, where automation is less practical due to the particular needs of each user, TASS provides a pre-existing structure or skeleton to be completed by adding the specific coding needed at an indicated location. (Tr., Vol. VI, pp. 23-29, 113-114, 125-126; Tr., Vol. VII, pp. 319-323, 388; Tr., Vol. XIII, pp. 1375-1379.) Mr. Ijames' conclusion that TASS met the ease of use requirement of the RFP was

supported by the testimony of Ms. Burk and Dr. Sibley, who described in detail how TASS accomplishes or facilitates setting security at each level with its automated features, skeletal structure, and use of universal subroutines. (Tr., Vol. VII, pp. 316-329; Tr., Vol. XII, pp. 1075-1082; Tr., Vol. XIII, pp. 1375-1379.)

E. Summary.

85. DCC reasonably found USC's proposal in substantial compliance with the technical requirements of the RFP. Stauffer failed to prove, by the greater weight of the evidence, that USC's bid did not conform substantially with the terms of the RFP.

II. EVALUATION OF THE COST PROPOSALS

A. Training

86. In the paragraph entitled "training" the RFP provided:

"Vendors must respond to the following alternative methods to meet our need for comprehensive training... ." (Exhibit 1, p. 10)

The bid specification for "training" is stated vaguely, particularly in comparison to other bid specifications such as User Interface Support and Indexing. The "training" section of the RFP did not define what constitutes "comprehensive training." Nowhere in the bid specification for "training" is there stated a requirement that training be provided in security, database design and system administrator topics. However, a reading of the RFP as a whole confirms the importance of security, database design, and system administration, thereby indicating the necessity of training in these areas. (E.g., Exhibit 1, p. 1, ¶¶ 1-3; p. 2, ¶¶ 1-3; p. 8, ¶ 4.) Moreover, training in these areas was necessary to be able to secure the information maintained by the system, to learn how to design databases within the methodology of the system, and to be able to install and manage the system at the state office and college levels. (Tr., Vol. 7, pp. 1029-1034.)

87. Comprehensive training was a requirement of the RFP, and reasonably encompassed training on the security features of the particular software being proposed, on the database design methodology incorporated in the software, and on administration of the software on DCC's computing systems. (Tr., Vol. 7, pp. 1029-1031, 1033-1034.)

88. Stauffer responded to the RFP's requirement for training in its technical proposal, where it listed five available courses under a description of its "comprehensive education program." (Exhibit 4, p. 26.) Each of these courses was described clearly and in detail in Stauffer's Education Information Package, attached as an exhibit to its technical proposal. (Exhibit 4, pp. 155-168.) In its cost proposal, Stauffer recommended purchase of both the Developer II and System Administrator classes, for a total charge of \$9,400. (Exhibit 5, p. 6.)

89. In the description of its Developer II course in its Education Information Package, Stauffer included the topics "security" and "normalized database design." (Exhibit 4, p. 158.) Likewise, the objectives for the Developer II course included: "design systems with knowledge of BLACKSMITH logic and normalized file structure," and "implement BLACKSMITH security." (Exhibit 4, p. 159.) In its Education Information Package, Stauffer described its System Administrator class as a course "for the data processing professional who will be maintaining BLACKSMITH and will oversee its use on the system." (Exhibit 4, p. 161.) There was no mention of database design, security, or system administration in the course description for Stauffer's Developer I class in its Education Information Package. (Exhibit 4, p. 157.)

90. Mr. Ijames relied upon the descriptions of Stauffer's courses in its technical proposal, and particularly in the Education Information Package, to determine that security, database design, and system administration were taught in Stauffer's Developer II and System Administration classes, and not in its Developer I class. (Tr., Vol. 7, pp. 1037-1038.)

91. Mr. Ijames reasonably concluded from reading Stauffer's descriptions of its courses in its Education Information Package that inclusion of the Developer II class in the cost of Stauffer's proposal was necessary for training in security and database design, and that inclusion of the System Administrator class was necessary for training in system administration. (Tr., Vol. 7, p. 1039; Tr., Vol. VII, pp. 403-404.)

92. Mr. Ijames' conclusion that comprehensive training necessarily included training in security, database design and system administration, and his conclusion that Stauffer's Developer II and System Administrator classes were necessary to provide such comprehensive training, were supported by the testimony of Ms. Burk and Dr. Sibley. (Tr., Vol. VII, pp. 394-400, 405; Tr., Vol. XII, pp. 1122-1124, 1126-1128.)

B. Security

93. Stauffer responded to the security requirements of the RFP by the statement in its technical proposal that the required security features were available through the use of "BLACKSMITH Security." (Exhibit 4, p. 14.) "BLACKSMITH Security" in Stauffer's technical proposal refers to the BLACKSMITH security module described at pages 138-141 of that proposal. Stauffer's cost proposal stated that the BLACKSMITH security module cost \$12,000 for a state-wide license. (Exhibit 5, p. 4.)

94. Mr. Ijames reasonably concluded, upon reading Stauffer's technical proposal, that its proposal to satisfy the RFP's requirements for security with "BLACKSMITH Security" referred to Stauffer's automated security module, "BLACKSMITH Security." (Tr., Vol. 7, pp. 1020-1021, 1027-1028.) Stauffer's expert witness, Henry Unger, testified in his deposition that he interpreted Stauffer's technical proposal as referring to Stauffer's automated security module. (Tr., Vol. 2, pp. 154-155.)

95. Stauffer's cost proposal contained a statement that "All required security features can be coded using the Application Generator's subroutine exits." (Exhibit 5, p. 5.) Stauffer's Application Generator is described in the brochure beginning at page 128 of its technical proposal. (Exhibit 4, pp. 128-133.) Security is not listed as a feature of the Application Generator in that brochure, nor is it readily identifiable as a feature of the Application Generator module, particularly in contrast with the description of the BLACKSMITH Security module in the brochure appearing at page 138 of Stauffer's technical proposal.

96. Mr. Ijames reasonably concluded from reading Stauffer's technical and cost proposals that the security features required by the RFP were provided by the automated BLACKSMITH Security module, and that the cost of that module was \$12,000. The testimony of Ms. Burk and Dr. Sibley supported that conclusion. (Tr., Vol. VII, pp. 385-386, 392-393; Tr., Vol. XII, p. 1121.) Moreover, neither Mr. Ijames, Ms. Burk nor Dr. Sibley, despite multiple readings of Stauffer's user manuals, could determine how security could be implemented in all of the required areas, or be implemented easily, without purchase of the automated security module. (Tr., Vol. 7, p. 1028; Tr., Vol. VI, pp. 10, 12, 16-17, 113; Tr., Vol. VII, pp. 389-392; Tr., Vol. VIII, pp. 560-563; Tr., Vol. XII, pp. 1108-1110, 1119, 1142, 1144.)

C. Summary

97. DCC and DOA reasonably determined that the cost of USC's proposal was \$113,200, and that the cost of Stauffer's proposal was \$114,100. Stauffer failed to prove, by the greater weight of the substantial evidence, that USC did not submit the lowest and best bid in response to the RFP.

CONCLUSIONS OF LAW

Based upon the substantial evidence presented in this case and the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. A department of the State of North Carolina is bound by the terms of the RFP and has the authority to accept only those offers that comply with the technical requirements of the RFP.

2. A department of the State of North Carolina accepts a bidder's offer by awarding the contract to the bidder.

3. The technical compliance of a bid submitted in response to the RFP depends on the language in the bid, not the actual capacity of the bidder to perform the requirements of the RFP. Although it is not necessary for a bid to use the precise language of the RFP, nevertheless the bid must reasonably "respond" to the specific requirements of the RFP.

4. The Secretary of the Department of Administration has the authority to reverse a decision of the State Purchasing Officer and can, upon the proper facts, award a contract to a protesting bidder. The Secretary is not limited to ordering a rebid. 1 NCAC 5D .0401; N.C. Gen. Stat. 143-52.

5. Because the Secretary of the Department of Administration has the authority to award a contract to a protesting bidder, an Administrative Law Judge has the authority to make such a recommendation.

6. It would be proper for the Secretary of the Department of Administration to award a contract to a protesting bidder if the protesting bidder establishes that it is the only bidder to have submitted a technically conforming bid in response to an RFP.

7. Although an agency or department of the State of North Carolina cannot be compelled to purchase a particular item, if that agency or department has decided to purchase the item, it can only do so in accordance with North Carolina law. If North Carolina law requires competitive sealed bidding for the item in question, the agency or department can only purchase the item from the bidder making the lowest and best bid most advantageous to the State. N.C. Gen. Stat. 143-52.

8. USC's bid was in substantial compliance with the technical requirements of the RFP.

9. USC's bid was the lowest and best bid most advantageous to the State.

10. In requesting that the contract in response to the RFP be awarded to USC, and in awarding the contract to USC, DCC and DOA did not exceed their authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.

RECOMMENDED DECISION

It is recommended that the North Carolina Department of Administration decree that:

1. The contract in response to the RFP was properly awarded to USC.

2. Stauffer is entitled to no relief in response to its Petition filed in this contested case proceeding.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

CONTESTED CASE DECISIONS

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Administration.

This the 10th day of June, 1993.

Thomas R. West
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 DHR 1699**

WAYNE SANDERS AND BRENDA SANDERS)	RECOMMENDED DECISION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW
Petitioner,)	
v.)	
NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES)	
Respondent.)	
)	

This matter came for hearing before the undersigned on April 27, 1993 at 9:00 A.M. This matter was before the Court on the petition of Wayne and Brenda Sanders ("the Sanders") for a contested case hearing challenging the revocation by the North Carolina Department of Human Resources ("the Department") of the Sanders' foster care license. The Sanders were present and represented by counsel, Edward F. Hennessey of Robinson, Bradshaw & Hinson, P.A. The Department appeared through its counsel, Assistant Attorney General T. Lane Mallonee.

The issues before the Court were whether (1) the circumstances under which Ashley Bartlett ("Ashley"), a foster child in the Sanders' care, sustained a fractured left femur in or about June 1992 reveal "neglect" on the Sanders' part entitling the Department to revoke their foster-care license; and (2) whether the circumstances under which Ashley received bruises or red marks on the backs of her calves in August 1992 reveal "improper discipline" by the Sanders entitling the Department to revoke their foster-care license. A determination in favor of the Department on either (1) or (2) would support revocation.

The Department presented evidence in support of its action through the following witnesses: (1) Betty Love of Mecklenburg County's Department of Social Services; (2) William C. Crummett, Jr., Social Worker III, Iredell County Department of Social Services; (3) Varna Lyles of Mecklenburg County Department of Social Services; (4) Faye Harris of Mecklenburg County Department of Social Services; and (5) Sandy Keever of Lincoln County Department of Social Services. Each of these witnesses was the subject of cross-examination by counsel for the Sanders, and in some cases of examination by the Court. The Sanders presented evidence in opposition to the Department's action in the form of their own testimony and that of Maxine Truslow, court-appointed guardian *ad litem* for Ashley. The Department did not elect to cross-examine any of the Sanders' witnesses.

Based on the evidence received at the hearing, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The Sanders became licensed foster-care providers in 1991. At the time the Sanders received their license, they had for some two years been applicants to adopt a child through Mecklenburg County DSS.

2. Ashley had been placed in the Sanders' care by Mecklenburg County DSS some months prior to the Sanders' receipt of their foster-care license. The Sanders applied for and received their foster-care license at the suggestion of Mecklenburg County DSS, as an adjunct to their efforts to adopt Ashley under the "Foster Care/Adopt" program that Mecklenburg County DSS was following at the time it placed Ashley with the Sanders.

3. The Sanders have at no time cared for or requested to care for foster children other than Ashley.

4. The Sanders have cared for Ashley continuously since Ashley was some four months old. Ashley is now nearly two years old. Other than the two allegations in this case, there is no suggestion that the Sanders have ever mistreated Ashley.

a. Findings As To The "Neglect" Allegation

5. On the evening of June 3, 1992, the Sanders noticed that Ashley seemed to be experiencing discomfort in her left foot or leg, causing her to be reluctant to put weight on the foot. This condition did not improve over the course of the evening, and the Sanders notified the nurse assigned to Ashley by Mecklenburg County DSS of the condition the next morning, and took Ashley for examination by a physician later that day.

6. No diagnosis of any sort of "injury" to Ashley was made on June 4, 1992, or on June 5, 1992, when the Sanders again took Ashley for a physician's examination with respect to the discomfort in her left foot or leg. The only tentative diagnoses made during these two visits were of an infection or some other agency that might produce inflammation in the left hip or leg. Antibiotics were prescribed, and were properly administered by the Sanders. The Sanders had no reason to know or suspect what was causing Ashley's discomfort through June 5, 1992.

7. On June 8, 1992, the Sanders again returned to physician's office to have Ashley examined. An x-ray examination conducted at Carolinas Medical Center on June 8 determined that Ashley had suffered a "greenstick" fracture of her left femur. The x-ray examination was conducted after Mr. Sanders suggested that one be done in light of Ashley's continued discomfort in her left foot or leg and the apparent failure of prescribed antibiotics to resolve the discomfort. Ashley was at that time learning to walk, and this type of fracture is typical of toddlers learning to walk (as the Investigative Summary prepared by Iredell DSS based on its investigation of the fracture relates).

8. The Court finds insufficient evidence to make any finding as to the specific cause of Ashley's fracture. Iredell County DSS concluded that the fracture had not occurred when Ashley had fallen in her walker several days before June 3, 1992, the only incident the Sanders could recall as a possible source of her injury. The evidence presented to the Court was consistent with this conclusion. The Department presented no evidence or theory whatsoever as to the cause of Ashley's injury in support of its argument that the injury was the product of neglect. The Court finds as well that the State presented no evidence tending to show (1) that the Sanders generally failed to supervise Ashley properly; (2) that any specific incident of improper supervision by the Sanders had produced Ashley's injury; (3) that the injury occurred while Mrs. Sanders was occupied with children to whom she was providing day-care services; or (4) that the Sanders failed to respond to signs that Ashley had been injured that were apparent prior to the date and time they reported first noticing her discomfort.

9. Evidence that the Sanders have at all times been properly attentive to Ashley's health and safety was uncontested. This evidence came through the testimony of the Sanders and Ms. Truslow. In addition, Mr. Crummett testified for the Department that he believed the Sanders to be appropriate caretakers and that Ashley's removal from their care would be unfortunate.

10. Iredell County DSS, in a report authored by Mr. Crummett, "substantiated" neglect of Ashley by the Sanders with regard to the leg fracture. The basis of the "substantiation" was apparently (1) that the fracture itself resulted from inadequate supervision of Ashley by the Sanders; (2) that the Sanders did not identify and respond to Ashley's injury with sufficient promptness and diligence; or (3) both (1) and (2). Neither this report nor any testimony at the April 27 hearing suggested that Ashley's injury reflected any deliberate act of the Sanders.

b. Findings As To The Improper Discipline Allegation

11. On August 24, 1992, one or more employees at the Kiddie Farms Day Care Center ("the Center") notified Mecklenburg DSS that they had identified marks (variously identified by witnesses at the hearing as "red marks" or "bruises") on the backs of Ashley's calves. The Court finds that these marks consisted of a discolored line across part of Ashley's left calf and a discolored "loop" mark (i.e. a mark that appeared to have "looped" around the curve of the calf) across the right calf.

12. Mrs. Sanders pointed these marks out to an employee at the Center on the morning of August 24, 1992, and explained her belief that the marks resulted from a child's indoor swing set. Ashley had outgrown the swing set to some extent, but enjoyed it and was permitted to swing in it. In the course of swinging in, sleeping in, or being removed from the swing set, Mrs. Sanders told the employee and testified at the hearing, she believed Ashley had received the marks on her calves.

13. Mrs. Sanders had observed marks such as those noticed on August 24, 1992 earlier, and had concluded at that time or those times that they were the product of Ashley's use of the swing set.

14. The only evidence of possible corporal punishment of Ashley by the Sanders was (1) the fact of marks on Ashley's calves; and (2) Sandy Keever's testimony that, in her opinion, the swing set had not caused the marks.

15. Lincoln County DSS, in a report authored by Ms. Keever, concluded that the marks reflected "improper discipline" of Ashley by the Sanders. There was no affirmative evidence of any sort presented in this report or at the April 27 hearing that the Sanders had ever disciplined Ashley by striking her. All testimony (including Ms. Keever's) was that the Sanders did not employ corporal punishment, that no instruments capable of inflicting the marks were observed in the Sanders' possession at any time, and that Ashley's responses to the Sanders were inconsistent with physical abuse. The Department offered no evidence or theory of what action by the Sanders had constituted "improper discipline" (other than Ms. Keever's conclusion that the swing set had not caused the marks, and an inference that some unspecified "discipline" had instead produced the marks. As earlier stated, there was no actual evidence of any act or instrument of "discipline").

II. CONCLUSIONS OF LAW

1. The resolution of this case is controlled by 10 N.C.A.C. 41F .0807. Under this regulation, a foster-care license is "automatically revoked when an agency duly authorized by law to investigate allegations of abuse or neglect finds that the foster parent has abused or neglected a child." 10 N.C.A.C. 41F .0807(a). Under 10 N.C.A.C. 41F .0807(e), appeal from a foster-care license revocation is under 10 N.C.A.C. 41A .0007. This regulation permits a foster-care licensee whose license has been revoked to "petition for a determination of ... legal rights, privileges, or duties" at any time prior to the effective date of the denial. 10 N.C.A.C. 41A .0007(b)(2).

2. The Court determines that there is no dispute that the various social-service agencies involved in the investigation of alleged abuse and neglect by the Sanders are agencies "duly authorized by law to investigate allegations of abuse or neglect" under 10 N.C.A.C. 41F .0807(a). The Court further determines that there is no dispute that the Sanders' appeal(s) from the revocation of their foster-care license was timely and otherwise procedurally proper under 10 N.C.A.C. 41A .0007(b).

3. The Court further determines that its role in this matter is to determine whether the Department has proven by the greater weight of the evidence that the Sanders "abused or neglected" Ashley within the meaning of 10 N.C.A.C. 41F .0807(a). The Court finds nothing in the law that places the initial burden on the Sanders to disprove abuse or neglect, and nothing granting deference to any agency conclusion (or, to use the word employed by the agencies involved in this case, "substantiation") that abuse or neglect occurred.

a. Conclusions As To The "Neglect" Allegation.

4. The Court concludes that the Department has not demonstrated by the greater weight of the evidence that the Sanders "neglected" Ashley in connection with the leg-fracture incident. The Court bases this conclusion on the following:

(a) The root of Iredell County DSS's suspicion that the leg-fracture reflected "neglect" seems to have been that the Sanders were unable to pinpoint the cause of Ashley's fracture. This alone does not reflect "neglect" on the facts of this case; as testimony from the Department's own witnesses revealed, the greenstick fracture Ashley suffered is not uncommon in children learning to walk, and could have occurred while Ashley was in her crib (where Mrs. Sanders first noticed Ashley in discomfort) or shortly before. In other words, the injury is of a kind that some children will incur naturally in the course of their development, and one that adult supervision, no matter how scrupulous, cannot entirely eliminate. For this reason, the injury does not "speak for itself" and is therefore different from, for example, a case in which the evidence suggested that a toddler had pulled a pan of boiling water from a stove, in which the facts of the injury alone suggest some lack of supervision. Without some evidence that this injury could in fact have been prevented by closer supervision, the Court is not prepared to conclude that the fact of injury alone shows neglect in, this case.

(b) Similarly, there is nothing in the evidence of what the Sanders did once Ashley began to display discomfort that shows neglect. The evidence in this regard was uniform; as soon as the Sanders noticed Ashley in discomfort, they contacted Mecklenburg County DSS and arranged for medical attention. Moreover, the Sanders concern for Ashley's welfare was sufficient to prompt them to return Ashley for medical attention immediately when initial visits failed to provide relief. Finally, there was no medical evidence offered, or even suggested, to indicate that Ashley's doctors noted a troublesome delay in treatment of the fracture. (The Court notes that in his testimony, Mr. Crummett suggested that Mr. Sanders suggestion, during Ashley's third doctor's visit, that x-rays be taken somehow supports an inference that he knew her leg was broken. The Court notes that Mr. Crummett made no such suggestion in his written report of the leg-fracture investigation he conducted contemporaneously. The Court also finds no basis to join in Mr. Crummett's suspicion based on its observation of Mr. Sanders during his testimony. Indeed, Mr. Crummett admitted in his letter and in his testimony that both of the Sanders were warm and concerned parents, and specifically remarked in his earlier written report that it would be unfortunate if Ashley were removed from their care. Finally, the Court finds Mr. Sanders' suggestion most consistent with Mr. Sanders' own explanation of it: having observed Ashley in continued discomfort after two earlier doctor's visits in which inconclusive diagnoses were reached, Mr. Sanders was understandably interested in Ashley receiving the tests that would support some firm diagnosis. Moreover, Mr. Crummett's suspicion in some sense misses the point; even if the evidence suggested that Mr. Sanders had some suspicion that Ashley had a fractured leg, as it does not, the issue is whether the suspicion points to some sort of neglect.)

(c) Moreover, there was no evidence whatsoever to suggest that the Sanders were generally neglectful or inattentive parents (evidence that might support an inference that a pattern of neglect had contributed to Ashley's injury or had led to delayed medical attention to the fracture). To the contrary, and again through the Department's witnesses, the evidence was that the Sanders are, if anything, unusually attentive to Ashley.

b. Conclusions As To The "Improper Discipline" Allegation

5. The Court notes at the outset that this allegation, as framed by the Department, is somewhat problematic. 10 N.C.A.C. 41F .0807(a) does not provide for foster-care license revocation for "improper discipline." The Court will, however, interpret this allegation to be one of "abuse" within the meaning of the regulation, as the allegation is of some sort of "active" mistreatment of Ashley rather than the passive or negligent mistreatment alleged with regard to the leg-fracture incident.

6. Like the earlier allegation, the Department's case here is built essentially on negative inference. Just as the Department argued that the Sanders inability to explain how Ashley broke her leg supports an inference of neglect, it appears to argue here that the Sanders' inability to explain the source of

the marks in a manner with which Lincoln County DSS supports an inference of abuse. As with the earlier allegation, there is no specific evidence pointing to a violation of the regulation in the circumstances that produced Ashley's injury, and no general evidence suggesting that the Sanders are (or even that they might be) abusive parents to Ashley. The Department's approach is therefore troubling at the outset because it implies that the Department's action is valid unless the Sanders can themselves prove by the greater weight of the evidence that the circumstances surrounding these incidents do not reflect neglect or abuse.

7. Following a full and careful review of the evidence, and based on its findings of fact, the Court again concludes that the Department has failed to prove the conduct required under 10 N.C.A.C. 41F .0807(a) by the greater weight of the evidence. The Court bases its conclusion on the following:

(a) Ms. Keever testified that she was trained and experienced in investigating child abuse, and stated specifically that she did not believe Ashley had been in any way abused by the Sanders. Moreover--and again in unison with every other witness--Ms. Keever testified that the Sanders were loving and attentive foster-care parents to Ashley and that she saw no affirmative evidence that the Sanders had ever physically disciplined Ashley in any manner. This "character" testimony is consistent with that of the Sanders, Ms. Truslow, and (for the Department) Ms. Love and Ms. Harris, who testified that the Sanders only interest in becoming foster care parents in the first place was to make themselves eligible to care for Ashley during what have apparently been tortuous (and continuing) adoption proceedings.

(b) The Court is unable to conclude that the Sanders abused Ashley based on the only specific evidence of possible abuse offered by the Department, which is (i) the marks; and (ii) Ms. Keever's conclusion that the marks did not come from an indoor swing set in which Ashley, though by then larger than the set could comfortably accommodate, nonetheless liked to play. In her letter conveying the initial conclusion of "improper discipline", Ms. Keever had noted that she based her conclusion that the swing set was not the source of the marks in part on her conclusion that Ashley would have had marks atop her thighs as well as on her calves if the calf marks resulted, as the Sanders claimed, from abrasion between Ashley and the swing set as they removed her from it. Nowhere in her letter did Ms. Keever indicate that she believed the swing set would simply not have abraded Ashley at the points in her calves where marks were, in fact, observed.

In her testimony, Ms. Keever admitted that it was possible that Ashley might not have displayed marks on the tops of her thighs in addition to those on her calves if the swing set were, as the Sanders believed, the source of the calf marks. Ms. Keever also admitted that she had never seen any actual marks on Ashley, but based her conclusions on where the marks were on Ashley's body and on how they might have been incurred based on photographs taken by Ms. Harris. Ms. Keever did consistently maintain the position in her testimony that her examination of the swing set suggested that the marks had not come from the set, but also admitted she had never seen or asked to see Ashley in the set to confirm her position.

(c) By contrast, Mrs. Sanders testified specifically that she had observed the marks and had pointed them out to a day-care worker on the day the marks were reported to Mecklenburg County DSS, explaining that they had come from Ashley's play in the swing set. Further, Mrs. Sanders testified that she had seen such marks on Ashley's legs at earlier times, and had then concluded that they resulted from play in the swing set. The Department offered no evidence to contradict this testimony, and the Court finds the testimony inconsistent with a conclusion that Mr. or Mrs. Sanders inflicted the marks on Ashley through some "abusive" conduct;

(d) Both of the Sanders testified that they had never disciplined Ashley physically in any way, and moreover that they possessed no instruments of physical discipline. The Department had asked Ms. Keever if the marks could have come from a belt or cord of some sort, and Ms. Keever answered that they could. The Department, however, offered no evidence that the Sanders possessed such an instrument, and much less evidence linking such an instrument to the marks. In fact, the Department did not question the Sanders on whether they possessed or had ever possessed such an instrument;

(e) Based on this evidence, the Court is left to debate, as the parties did at the hearing, how the marks came to appear on Ashley's calves. The Court cannot, however, conclude, as the Department would

have it do, that the marks reveal abuse. The evidence of any sort of physical discipline of Ashley by the Sanders was uniform: even the Department's witnesses admitted that they had no reason to suspect that the Sanders ever struck Ashley (and the impressions of the Sanders given by these witnesses support, if anything, the opposite conclusion), and had no evidence that the Sanders possessed or had ever possessed any instrument of physical discipline that could have left the marks. Notably, Ms. Keever testified that Ashley showed none of the behaviors associated with child abuse, and stated that she did not believe Ashley to have been abused. As earlier stated, evidence concerning the history of the Sanders relationship with Ashley and of their foster-care license reveals no abusive tendencies or any reason to suspect that the Sanders treated Ashley improperly.

In evaluating the Department's case, therefore, the Court must determine whether Ms. Keever's testimony--the only source of evidence supporting a theory of "abusive" conduct--, understood in light of the other evidence in this case, is sufficient to carry the Department's burden. The Court concludes that it is not. It is simply not enough for the Department to show evidence of marks and to attempt to discredit the Sanders' explanation of their origin; without some affirmative evidence that the marks reflected some conduct constituting "abuse" under the controlling regulation, or at least that the Sanders used physical discipline or even possessed some instrument of physical discipline, the Court cannot conclude that the Department has carried its burden on this allegation.

Based on the foregoing findings of fact and conclusions of law, it is hereby RECOMMENDED as follows:

- (1) The Department has failed to prove either neglect or abuse on the part of the Sanders by the greater weight of the evidence;
- (2) The Department is therefore without basis to revoke the Sanders foster-care license; and
- (3) The Sanders foster-care license is accordingly reinstated.

This 7th day of June, 1993.

Robert Roosevelt Reilly Jr.
Administrative Law Judge Presiding

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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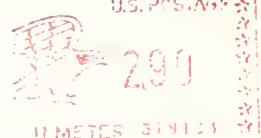
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